

Before the
COPYRIGHT ROYALTY BOARD
LIBRARY OF CONGRESS
Washington, D.C.

In the matter of:

The Digital Performance
Right in Sound Recordings || Docket No.
and Ephemeral Recordings|| 2005-1 CRB DTRA
(Webcasting Rate
Adjustment Proceeding)

Volume 6

Room LM-414
Library of Congress
First and Independence Ave., S.E.
Washington, D.C. 20540

Tuesday,
May 9, 2006

The above-entitled matter came on for
hearing, pursuant to notice, at 9:30 a.m.

BEFORE:

THE HONORABLE JAMES SLEDGE, Chief Judge
THE HONORABLE WILLIAM J. ROBERTS, JR., Judge
THE HONORABLE STAN WISNIEWSKI, Judge

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Erik Brynjolfsson 6

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P-R-O-C-E-E-D-I-N-G-S

9:33 a.m.

CHIEF JUDGE SLEDGE: Thank you.
We'll come to order.

MR. SMITH: Your Honor, I did not
offer you the binders as we have done with
other witnesses for Dr. Brynjolfsson. I have
one here if you'd like them. I don't want to
pile things on your desk if they'll just be in
the way.

CHIEF JUDGE SLEDGE: Thank you,
that might be a reference. Counsel.

MR. STEINTHAL: Thank you, Your
Honor.
Whereupon,

ERIK BRYNJOLFSSON
was recalled a witness by Counsel for
SoundExchange, and having been previously duly
sworn, resumed the witness stand, was examined
and testified as follows:

CROSS EXAMINATION (continued)

BY MR. STEINTHAL:

1 Q Good morning, Professor.

2 A Good morning.

3 Q Now, you acknowledge in your
4 testimony that you focused your inquiry on the
5 major four record companies. Correct?

6 A That's correct.

7 Q SoundExchange, however, represents
8 hundreds or thousands of sound recording
9 companies. Correct?

10 A I don't know the exact number.

11 Q Clearly hundreds?

12 A I'm not sure.

13 Q Have you ever heard of the phrase
14 indies in the context of the music business?

15 A Yes, I have.

16 Q Do you understand that the indies
17 are part of the SoundExchange group of
18 companies that it represents?

19 A I believe so.

20 Q In fact, your understanding is, is
21 it not, that what's at issue here is a blanket
22 license with respect to all of the U.S. sound

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1 recording copyright owners. Correct?

2 A Yes.

3 Q As part of your report and
4 project, did you consider the licensing
5 practices of any labels other than the big
6 four labels?

7 A I considered the value of the
8 copyrights and that's primarily a function of
9 the value of the music regardless of whether
10 they're owned by a large label or a small
11 label.

12 Q So, your model assumes really no
13 difference between whether the sound recording
14 copyright owner is an indie or a large label.
15 Correct?

16 A I didn't focus on those
17 distinctions.

18 Q Now, I believe you testified that
19 if the compulsory license rate, the statutory
20 license rate had been set too high in the
21 first place, webcasters would have had the
22 option of simply abandoning the market. Is

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1 that right?

2 A Yes, they would.

3 Q And you believe that the fact that
4 AOL and Yahoo and Microsoft and some others
5 have stayed in the business is evidence that
6 the prior rate was not too high. Correct?

7 A Yes, I do.

8 Q Did you consider how many fewer
9 webcasters there are today than there were
10 before the CARP rate was set and for the first
11 CARP proceeding?

12 A As I mentioned yesterday, there
13 has been significant entry, very large
14 investments. There have also been departures
15 mostly of smaller hobbyist, nonviable
16 companies.

17 Q Smaller hobbyist nonviable?
18 That's --

19 A Primarily, yes.

20 Q Let's go then and take a look at
21 the Ting and Wildman report that you relied on
22 to some extent.

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1 MR. STEINTHAL: Your Honor, it's
2 at Services Exhibit -- it's still up with you
3 I believe.

4 CHIEF JUDGE SLEDGE: Services
5 Exhibit 15?

6 MR. STEINTHAL: It's in your pile
7 here. Thank you.

8 CHIEF JUDGE SLEDGE: Thank you.

9 BY MR. STEINTHAL:

10 Q Take a look at the very first page
11 of the Ting and Wildman report. The very
12 first paragraph, the introduction. See how in
13 the first paragraph it is stated "In the
14 euphoria over rapidly improving Internet and
15 multimedia delivery technologies in the late
16 1900s, webcasting was touted by many as a
17 technology that would revolutionize the
18 entertainment world and it was forecast that
19 audio webcasting services would soon be a
20 major threat to over the air radio stations.
21 The actual experience hasn't fallen
22 considerably short of these optimistic

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1 projections. Although audience size has
2 increased significantly, advertisers have not
3 embraced this new medium as they anticipated.
4 Furthermore, while costs have declined
5 remarkably, they are not near low enough for
6 profitability given the add revenues the new
7 services have been generating or can be
8 expected to generate for at the near future.
9 Partly as a result, thousands of Internet
10 radio stations have gone off line since April
11 2001 including both top stations and unheard
12 of small webcasters."

13 Do you have any reason to doubt
14 the accuracy of that statement?

15 A No.

16 Q Do you know what Ting and Wildman
17 meant when they referred to top stations
18 having gone out of business?

19 A Well, what he's describing here is
20 what happened in the Internet broadly. There
21 were big search engines, competitors to Yahoo,
22 that went out of business. There were

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1 companies in virtually every aspect of the
2 Internet that were started during the
3 euphoria, the irrational exuberance of the
4 late 1900s. I was quite familiar with that.
5 I was at Stanford University and -- and helped
6 some of the -- the MBAs. Watched them start
7 companies in that area. Companies far larger
8 than any of these webcasters in lots of
9 different industries.

10 Placed some bets. Some of them
11 were very successful. Some of them are worth
12 tens of billions if not hundreds of billions
13 of dollars. Many others have gone out of
14 business. What happened in -- in webcasting
15 is very similar to what happened in many
16 industries.

17 As I mentioned yesterday, in the
18 webcasting area, this was exacerbated by the
19 fact that initially these companies had to pay
20 zero for the music. Although I suspect that
21 even if they had -- even if it hadn't been for
22 that artificially low level, there probably

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1 would have been a lot of people who started
2 companies, some of them fully capitalized,
3 some of them better capitalized, that made
4 attempts and I think that Ting and Wildman
5 actually described the situation back before
6 September 2002 when there was a dip in the
7 Internet in general and in webcasting in
8 particular as I described in my report.

9 Q Do you know when the first CARP
10 rate was set? It was between April 2001 and
11 September 2002. Wasn't it?

12 A Yes, it was.

13 Q And when Ting and Wildman --

14 A Exactly, it was set in that --
15 that's probably the point. It was set during
16 this period when there was a great of
17 disappointment at what the promise was for
18 webcasting that a lot of people had fallen
19 short. Ad revenues were disappointing and
20 people were having a lot of trouble. That was
21 the environment that the last CARP was set in.

22 Q You don't -- strike that. When

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1 you testified earlier that it was hobbyists
2 and those kinds of companies that went out of
3 business from the webcasting business since
4 2001, you don't doubt the accuracy of the
5 statement here that thousands of Internet
6 radio stations went off line after April 2001
7 including both top stations and unheard of
8 small webcasters?

9 A Right. What I said was that it
10 was mostly hobbyists and smaller companies.
11 Even -- even with what was "large companies"
12 back in -- whatever the top stations were --
13 were really tiny by today's standards.

14 For instance, NetRadio, the
15 company that I used for the -- my bench mark
16 for some of the advertising rates back then,
17 it was an extremely small company. Smaller
18 than any of the companies that we're talking
19 about today and the only reason I used them
20 was because they happen to have the very
21 highest revenues for one quarter. So, I
22 wanted to be as conservative as possible and

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1 set as high as possible bench mark back then.

2 But, that's not to say that any of
3 those companies had anywhere near the -- the
4 capitalization or scale of the companies
5 today.

6 Q I was going to ask you that later.
7 You're -- you're boasting about how you chose
8 such a high number and you use the highest one
9 available NetRadio.

10 A Yes.

11 Q NetRadio went out of business.
12 Right?

13 A Yes, it did.

14 Q Okay. But, the companies that are
15 in this case, AOL, Yahoo, Microsoft, didn't go
16 out of business. Right

17 A That's exactly right.

18 Q And you didn't use their revenue
19 numbers.

20 A That's right.

21 Q So, if you have used higher
22 revenue numbers, your results would have been

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1 actually better for the webcasters. Right?

2 A No, you misunderstand the model.
3 Let me explain.

4 For model one, what I did was I
5 looked at the change in economic value from
6 2001 to currently. So, in order to be as
7 conservative as possible, what I wanted to do
8 was choose people with the highest revenues
9 back then so when we looked at the change, it
10 would be a conservative estimate of how much
11 things have improved. Had I as you suggest
12 used Yahoo or the other ones which I didn't
13 have the data for, but presumably there were
14 lower levels of revenue. That's certainly
15 what you're suggesting. Then there would have
16 been an even bigger improvement in economic --

17 Q But --

18 A -- that -- can I finish my
19 sentence?

20 Q Yes.

21 A There would have been an even
22 bigger improvement in economic value. So,

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1 contrary to what you just said, it would have
2 led to an even bigger proposed royalty, but my
3 decision was to use companies that were --
4 that -- that when I had a choice to use
5 conservative values so that we could be
6 confident that my estimate was a lower bound
7 on what the free market would have decided
8 among women buyers and women sellers.

9 Q Okay. You successfully turned
10 upside down what my question was. You chose
11 did you not --

12 MR. SMITH: Object to the
13 commentary by counsel as inappropriate.

14 CHIEF JUDGE SLEDGE: Sustained.

15 BY MR. STEINTHAL:

16 Q You said to be conservative, you
17 used a higher revenue number from NetRadio.
18 That's your testimony. Right?

19 A That is exactly right.

20 Q And NetRadio's a company that was
21 such a high revenue company that it went out
22 of business. Right?

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1 A No, that is not --

2 Q It went out business. Right?

3 A That is true.

4 Q Okay. Now, had you used higher
5 revenue information associated with the
6 operations of AOL or Yahoo, companies that
7 survived to use your jargon, that would have
8 driven a better number for the webcasters
9 under your model. Wouldn't it have?

10 A No, the number that I used was the
11 high --of all the data that I had access to
12 that I was able to obtain from public
13 documents, I specifically chose the very
14 highest revenue per listener hour that was
15 available and that was -- that -- it happened
16 to be from NetRadio.

17 I had not evidence that any
18 company anywhere was making more revenue than
19 NetRadio. So, I picked the most conservative
20 one which for the sake of looking at
21 differences would have been the one with the
22 highest revenue per listener hour at that

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1 point.

2 Q Hypothetically, had you had
3 revenue information from a company that
4 survived as opposed to a company that didn't
5 survive and that revenue information was
6 higher per hour than NetRadio's, then your
7 model would have yielded a different result to
8 the benefit of the webcasters. Right?

9 A If the facts were different, the
10 conclusions would be different. Yes.

11 Q Now, are you aware, sir, that --

12 A But, let me just state. Actually,
13 the nice thing is that we did have discovery.
14 So, that was helpful. So, after I wrote my
15 report, we were able to do discovery and at
16 that point, I did get access to some
17 information now that -- now that you mention
18 it and the only company that provided data
19 that was comparable to -- to be able to go
20 back that period was Live365 and as I state in
21 my amended testimony, when we plug in their
22 numbers, as expected the actual increase in

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1 surplus was substantially larger. Off the top
2 of my head, I recall there was approximately
3 three cents in my original October testimony
4 when I used the actual data from Live365. It
5 was closer to approximately six cents of
6 improvement.

7 So, we don't actually have to go
8 over the hypothetical. We can go with the
9 data that was provided and it showed a bigger
10 improvement. As I recall, both the revenue
11 improvement and the cost improvement was
12 greater than what I had estimated in my
13 October testimony. So, indeed, I had been
14 conservative.

15 Q And you're referring to Live365,
16 the only stand-alone webcasters among the four
17 that are participating in this case. Right?

18 A Here, let me just --

19 Q Is that right?

20 A On table one of my amended
21 testimony has the exact numbers that we --
22 we're talking about right here. Live365

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1 revenue in fiscal year 2002 was --

2 JUDGE ROBERTS: What page is, sir?

3 THE WITNESS: That's on page four
4 of my amended testimony.

5 So, the revenue in fiscal year
6 2002 was just over eight tenths of a cent net
7 of credit card fees and so forth. That's the
8 first number in the first column of table two
9 there and whereas -- as -- as you recall,
10 NetRadio had revenue of -- north of two cents.
11 So, I used the much more conservative NetRadio
12 ones and without going through all the numbers
13 what you can see here is by fiscal year 2005,
14 the improvement in economic value from Live365
15 was just over six cents which is the one, two,
16 three, fourth column under 2005. It says
17 increase in economic value compared to 2002
18 0.06 with some more decimal places. Six cents

19 Whereas, my model had -- my model
20 had only predicted 0.293 cents. So, the
21 actual -- once we have the data, we saw that,
22 in fact, the actual improving economic value

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1 was -- was more than double what my
2 conservative estimates by -- so, thank you for
3 helping us clarify that.

4 BY MR. STEINTHAL:

5 Q Thank you for going out of your
6 way to answer the question that I didn't ask.

7 Now, let's talk about that actual
8 data for a minute --

9 A I -- I think that was the question
10 you asked.

11 Q -- Professor Brynjolfsson.

12 A Actual data as opposed to we went
13 with the -- with the data that we used in the
14 original report. We do have actual data.

15 Q So, based on that data, would you
16 recommend Live365 to pay, let me get this
17 right, more than three cents an hour for sound
18 recordings if they were generating -- what's
19 your number there?

20 A The improvement economic values --

21 Q No. No, what's the number you
22 just said was the actual revenue per hour they

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1 were generating in 2002?

2 A Eight tenths of a cent.

3 Q Okay. So, under the old statutory
4 rate, you'd have to be pretty much a moron to
5 continuing operating unless you were investing
6 in the future. Right?

7 A There are a lot of reasons that --
8 why --

9 Q Just yes or no.

10 A The answer's no. There are a lot
11 of reasons why you might want to do that if
12 you were a very astute businessman, a rational
13 businessman and those include the fact that
14 many of these companies report that they get
15 benefits to other parts of their business from
16 sound recordings.

17 For instance, Bob Roback reported
18 that Launchcast 3 was a primary driver of
19 revenues to other parts of the business like
20 Launchcast subscription business. Also, that
21 people came in through the front page.

22 AOL gets additional subscribers to

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1 their broadband service. They don't account
2 for any of that revenue in their music
3 business.

4 Clear Channel and Brian Parsons in
5 numerous reports suggests that one of the big
6 advantages of having webcasting service is
7 it's a compliment to their over-the-air radio.

8 So, there are lots of reasons that
9 people would do this because of -- or these
10 spill-over benefits.

11 In addition, there's also benefits
12 as you suggested for the future. That many
13 times people will invest in building an
14 audience in the short run in order to be able
15 to capture revenues from that audience in the
16 future.

17 For all those reasons, it's
18 standard practice to invest in new businesses
19 to benefit your other businesses and to
20 capture revenues in the future.

21 Q Now, Professor Brynjolfsson, if
22 I'm a stand-alone webcasters and I don't have

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1 a portal, I don't have any indirect benefits,
2 I'm just trying to operate a webcasting
3 business, none of what you said, none of it,
4 that relates to AOL or Yahoo or Microsoft or
5 Clear Channel as a multimedia company would be
6 applicable. Right?

7 A That's not necessarily true. For
8 instance, Musicmatch was acquired for \$160
9 million by Yahoo in part because of these
10 sorts of benefits that -- that companies
11 perceive would be possible in other parts of
12 the business and certainly, all the part --
13 the stuff I mentioned about building an
14 audience and being able to capitalize that in
15 the future would also be relevant.

16 It creates options and
17 opportunities that can be very -- very value
18 and, in fact, have proven to be very valuable.

19 Q Proven to be valuable to who?

20 A To webcasters.

21 Q And instead of the generic proven
22 to be valuable, how valuable was it to

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1 NetRadio?

2 A There were numerous companies that
3 were not successful. There are numerous
4 companies that -- that were successful. I've
5 said that from the beginning. I -- I -- but,
6 that's non-dispute.

7 Q But, just to stick with me, you --
8 you thought that Live365 is probably the -- of
9 the surviving stand-alone webcasters from
10 2001, can you name one stand-alone webcaster
11 that survived since 2001 other than Live 365?

12 A The reason I used Live365 was
13 because they provided the data that -- that we
14 requested. If it was possible, that I would
15 have been happy to do it for other companies.
16 I'm not focusing on it for -- for any other
17 reason than that.

18 But, you're absolutely right. A
19 key benefit of webcasting is the spill over to
20 other parts of the business and, therefore,
21 the -- the companies like Yahoo and AOL that
22 have other parts of their business, I think in

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1 general are going to have even greater
2 economic value than to calculate just from the
3 stand-alone business.

4 That additional economic value is
5 not something I included in my model, but as -
6 - as your question suggests, it's probably
7 substantial.

8 Q Are you aware of anything in the
9 statute that guides the setting of rates in
10 this case that suggests that we ought to be
11 setting a rate that only large webcasters and
12 portals can afford to pay as opposed to stand-
13 alone webcasters that don't have indirect
14 benefits?

15 A Yes, there are several things that
16 suggest that we should look at those
17 companies. First off, we should at what --

18 Q No. No, not we. I asked you the
19 legislative history.

20 A We as -- as a group have been
21 directed -- I have been directed to look at
22 what a willing buyer and willing seller would

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1 pay in the marketplace. Because that
2 marketplace is going to be set by successful
3 companies.

4 You and I could go start a car
5 company. I don't know how much it would cost
6 us to build a -- a Prius or a -- or a Ford
7 expedition. We might not be very successful.
8 We would not really be setting the market
9 there. It would be -- not be very meaningful
10 to not look at the companies that are actually
11 efficient and successful companies that know
12 how to capture revenues in order to set the
13 marketplace. That's the capitalism works.

14 It's not a -- a charity exercise
15 where we say well, if you can be -- if you can
16 be efficient, great. If you're not efficient,
17 we're going to provide subsidies.

18 Furthermore, the statute as I
19 understand it, second point, does say that the
20 -- the indirect consideration, I don't have
21 the exact language in front of me, the
22 indirect considerations would be taken into

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1 account. But, that's -- that's part of -- of
2 setting the rates. So, the extent that these
3 companies have other benefits, in principal,
4 that would also be something that -- that a
5 willing buyer and seller would take into
6 account when they're -- when they're setting
7 the rates.

8 Q I'm afraid I have to go back and
9 ask the same question I asked. Are you aware
10 of anything the statute or the legislative
11 history that suggests that this proceeding is
12 meant to set a rate for portals and other
13 multimedia companies as opposed to stand-alone
14 webcasting?

15 MR. SMITH: Objection. Asked and
16 answered, Your Honor.

17 MR. STEINTHAL: That answer, you
18 can read it back, was certainly not an answer
19 to whether there was anything in the
20 legislative history or the statutes.

21 THE WITNESS: I'd be happy to try
22 to -- to -- to --

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1 CHIEF JUDGE SLEDGE: Objection's
2 overruled.

3 THE WITNESS: -- clarify. Yes,
4 let me just -- just clarify.

5 The statute asks what a willing
6 buyer and willing seller would come to in
7 marketplace. What they would agree to. It's
8 my judgment with my background in economics,
9 my understanding of this industry, that market
10 price would be very strongly influenced,
11 primarily set by the companies that are
12 successful and -- and have skills and
13 resources to be able to pay for web servers,
14 copyrights and other necessary components.

15 So, it would be appropriate when
16 you're trying to understand what the market
17 price is as we've -- and what the willing
18 buyers and sellers would agree to to look at
19 the relevant willing buyers and relevant
20 willing sellers.

21 BY MR. STEINTHAL:

22 Q And that's all you can point to

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1 about legislative history or statutory intent
2 associated with looking at those indirect
3 benefits, portals as distinguished from the
4 circumstances of a stand-alone webcaster.
5 Right?

6 A Well, my answer the first time I
7 mentioned two reasons including those
8 indirect, but my second time, I didn't even
9 mention the indirect benefits. But, also
10 those -- those benefits as well. I was
11 focusing on companies that were efficient in
12 doing webcasting services. So, those are the
13 two components again.

14 Q And just so it's clear, you
15 studied this industry, you talked about how
16 in-depth you've studied it --

17 A Yes, I have.

18 Q -- other than small webcasters
19 covered by the small webcaster settlement, can
20 you name one stand-alone webcaster that has
21 survived from 2001?

22 A Well, we were just talking about

1 Live 365.

2 Q Other than Live 365.

3 A Rhapsody.

4 Q Rhapsody? Rhapsody's an on-demand
5 service. Isn't it?

6 A Well, okay. It depends on how
7 narrowly you want to define --

8 Q I want it as narrowly as the
9 statute defines what we're here for.
10 Companies operating statutory webcasting.

11 A AccuRadio.

12 Q AccuRadio, you think they're
13 operating on a stand-alone basis not under the
14 Small Webcaster Act or you just don't know?

15 A I don't know for sure. Actually,
16 well, they certainly are ramping up their
17 scale. I don't know exactly where they fall
18 at this point.

19 Q Other than them?

20 A Not off the top of head. I can
21 look into that if you'd like.

22 Q Now, if we were to look at the

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1 number of services that had filed notices of
2 digital transmissions under the Section 114
3 compulsory license in 2001 -- why don't we
4 mark the -- as an exhibit, Services Exhibit 23
5 and 24.

6 Twenty-three will be a copy from
7 the Copyright Office website. It's 85 pages
8 long of the services that had filed notices of
9 digital transmission to perform sound
10 recordings under the statutory license.

11 (Whereupon, the document
12 was marked as Services
13 Exhibit 23 for
14 identification.)

15 MR. STEINTHAL: And Exhibit 24
16 will be the one filed that is current as of
17 May 25th, 2005 which is 11 pages long.

18 (Whereupon, the document
19 was marked as Services
20 Exhibit 24 for
21 identification.)

22 CHIEF JUDGE SLEDGE: Is what year?

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1

2

MR. STEINTHAL: 2001? 2001 and

3

Exhibit 24 is the one effective May 25, 2005.

4

BY MR. STEINTHAL:

5

Q Have you ever referred to the list

6

of the entities that have filed notices of

7

their intent to avail themselves of the

8

statutory license that brings us together here

9

in the courtroom?

10

A Not in any detail.

11

Q I'll represent to you that we

12

counted them up and there were just under

13

2,000 entities that filed notices of intent in

14

2001 and 545 entities in 2005. Does that

15

comport with your recollection of the

16

magnitude of the extent to which webcasters

17

lead this industry after the 2001 CARP rate

18

setting?

19

A I don't know for sure.

20

Q Does it comport with your

21

recollection of most, a substantial majority

22

of the entities that actually filed notices of

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1 intent are over-the-air radio stations that
2 are streaming their radio stations?

3 A That seems right.

4 MR. STEINTHAL: I would move
5 Exhibits 23 and 24 into evidence, Your Honor.

6 MR. SMITH:

7 CHIEF JUDGE SLEDGE: On what
8 basis?

9 MR. STEINTHAL: Just as a public
10 document, public records as to entities that
11 file notices of intent to avail themselves of
12 the statutory license.

13 CHIEF JUDGE SLEDGE: Is it
14 certified?

15 MR. STEINTHAL: Excuse me.

16 CHIEF JUDGE SLEDGE: Is it
17 certified?

18 MR. STEINTHAL: It is not
19 certified. We can -- if Your Honor feels that
20 would be appropriate, we will do so and offer
21 it in through one of our witnesses.

22 CHIEF JUDGE SLEDGE: Any objection

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1 to Exhibit 23?

2 MR. SMITH: Your Honor, could I
3 ask for the opportunity to verify what these
4 are and their completeness before we have a
5 ruling? They haven't been identified by any
6 witness. I've never seen them before.

7 CHIEF JUDGE SLEDGE: I'm loath to
8 delay rulings on evidence as often those fall
9 through the cracks.

10 MR. SMITH: In that case, I object
11 at this point, Your Honor.

12 CHIEF JUDGE SLEDGE: Objection
13 sustained.

14 Any objection to Exhibit 24?

15 MR. SMITH: Same objection, Your
16 Honor.

17 CHIEF JUDGE SLEDGE: The objection
18 is sustained.

19 BY MR. STEINTHAL:

20 Q Professor, did you do any analysis
21 at all of the correlation between the rate
22 setting in the first CARP and the decline in

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1 the number of webcasters?

2 A Not any explicit correlation if
3 you're referring to some sort of statistical
4 analysis. No.

5 Q Well, did you do any analysis,
6 correlation if any?

7 A Well, as I -- as I just mentioned
8 when the input was free, it's basic economics
9 that you're going to have people can survive,
10 that -- and can -- and stay in business.
11 People weren't even seeking to make a profit
12 that would chose to exit when they have to pay
13 for the music.

14 Q It was never free. Was it? It
15 was just subject to a rate setting that was
16 going to have application 1998 forward.
17 Right?

18 A My understanding is that they
19 didn't have to pay until that time they have
20 the option of leaving.

21 Q Well, your understanding is that
22 it was never free though. That as a matter of

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1 cash flow, they didn't have to pay until --

2 A Right.

3 Q -- the rate was set. Correct?

4 A That's correct.

5 Q Okay. Now, you testified before
6 that as -- as you confirmed today, the fact
7 that any webcasters remain in the market is
8 evidence that the rate was not too high.
9 Right?

10 A Not just that they remained, but
11 that they invested and that new companies have
12 -- have entered and -- and sophisticated
13 investors have put money into this business in
14 webcasting stock.

15 Q Well, let me ask you this
16 question. Is it your view that if the rate
17 was set a penny too high there would be not
18 webcasters, webcasting under the statutory
19 license?

20 A If the rate was set higher than
21 what companies could expect to make -- have a
22 viable business at, then you wouldn't have

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1 people investing in it and entering the
2 business.

3 Q All other things being equal?

4 A Right.

5 Q Now, as a result of this
6 consolidation I think was the word you used at
7 one point in the webcaster market, you believe
8 that there's been a consolidation since 2001
9 in the webcasting market?

10 A There was certainly a
11 consolidation at that point and there's also
12 been significant entry. I believe that there
13 have been 480 radio stations from Clear
14 Channel alone that have entered.

15 Q Putting aside over-the-air radio
16 stations that are simulcasting their signal,
17 has there been new entry that you're familiar
18 with on a stand-alone webcaster basis?

19 A Well, we talked yesterday about
20 AccuRadio. There's a company that wasn't a --
21 a webcaster, a significant webcaster. Kurt
22 Hansen went out and got investors. As I

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1 recall, he got -- a couple of years, he had
2 investor -- a group of investors pay \$250,000
3 for ten percent of his company. More
4 recently, he had investors pay \$100,000 for
5 one percent of his company. If you do the
6 math, that suggests that the value of his
7 company has gone up about fourfold in the past
8 couple of years as, you know, based on that
9 those investors thought the -- the value would
10 be and his plans according to his -- that we
11 saw yesterday were that he expects to --

12 MR. OXENFORD: Excuse me, Your
13 Honor. There is restricted testimony being
14 offered.

15 THE WITNESS: Oh, I'm sorry.

16 MR. OXENFORD: Could I ask that
17 the testimony be marked in the record as being
18 restricted information and is being stamped.
19 If the witness is going to be providing
20 additional restricted information about the
21 finances of AccuRadio, that those also be
22 marked restricted and the room -- and we go

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1 into closed session.

2 CHIEF JUDGE SLEDGE: If you'll
3 seek to limit your testimony to nonrestrictive
4 information until we are operating under the
5 protective order.

6 THE WITNESS: Absolutely and my
7 apologies. I just -- I provide as detailed an
8 answer as possible. My -- my -- I'll be more
9 careful.

10 BY MR. STEINTHAL:

11 Q Other than AccuRadio which -- as
12 you sit here today, do you know whether
13 AccuRadio was a new entrant since 2001 or not?

14 A I don't know the exact date that
15 they started their webcasting service.

16 Q You talked about new entrants
17 coming on the market. That's what I'm not
18 focusing on. Can you name one stand-alone
19 webcaster that's a new entrant in the
20 statutory webcasting market since 2001?

21 A Well, you mean aside from the 480
22 Clear Channel stations and aside from the one

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1 that I just -- the company that I just
2 mentioned that -- that's ramping up its
3 business?

4 Q Yes, aside from Clear Channel or
5 any other over-the-air broadcasters and
6 AccuRadio which may or may not have been
7 existence to your knowledge in 2001, can you
8 identify any new entrants into the webcasting
9 business since 2001? You said there was a
10 whole flood of them. I'm trying to find out
11 who it was.

12 A Well, in addition to the actual
13 new entrants, there is also investments made
14 by the company. So, I was referring to both
15 of those sets and you know.

16 Q So, just simple enough, can you
17 identify any new entrants since 2001 that are
18 webcasters not broadcasters or AccuRadio?

19 A At this point, not in addition to
20 the ones that I've already -- I've mentioned.

21 Q And I think you testified, did you
22 not, that the bulk of the webcasting activity

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1 as a result of this consolidation more than 90
2 percent of the actual webcasting hours are
3 from less than ten companies. Right?

4 A I don't recall those specific
5 numbers.

6 Q Does it sound right to you?

7 A Sounds like the right approximate
8 amount.

9 Q And do you know who the top ten
10 are? I mean AOL, Yahoo, MTV, Microsoft.
11 These are all multimedia portals. Right?

12 A The ones you just listed are.

13 Q Other than Live365 a stand alone,
14 can you tell me any other stand-alone
15 webcaster that's in the top ten?

16 A Well, other than that we -- we
17 also -- there are companies that aren't
18 portals. I wouldn't really consider Rhapsody
19 a portal. It's a music service. They have a
20 whole set of different kinds of music
21 services.

22 AccuRadio is focused primarily on

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1 -- on the webcasting, but I think I agree
2 with, I think, the essence of your point which
3 is that webcasting services appear to be
4 especially profitable when they're combined
5 with other services where they -- they can
6 capture some of those spill overs.

7 Q Just to be clear, Rhapsody is a
8 company that's owned by Real Networks. Is
9 that right or do you now know?

10 A Yes.

11 Q And Real Networks is a multimedia
12 company. Is it not?

13 A I wouldn't necessarily
14 characterize it that way.

15 Q You'd agree with me that its
16 revenues from webcasting is likely to be a
17 tiny amount of its total revenues no matter
18 how you define tiny?

19 A Well, you've referred to portals
20 before. Real Networks is -- is -- is not a
21 portal. So, they have -- they have various
22 types of software that they provide and so

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1 forth that aren't the kind of media portal
2 that -- that the other companies, Yahoo, AOL
3 and so forth are.

4 But -- but, I mean I am happy to
5 agree with your basic point, I think, which is
6 that their companies that have other spill
7 overs earn even more value from webcasting in
8 general. They appear to be especially
9 successful in -- in capturing the value from
10 webcasting services.

11 Q Did you consider in connection
12 with your testimony as to why it was -- strike
13 that. As you said before that, you know, the
14 fact that people have paid the prior rate is
15 an indication that it wasn't too high. In
16 connection with that testimony, did you
17 consider whether there might have been other
18 motivations of entities that chose to pay that
19 rate even though they believed the rate was
20 too high?

21 A Well, I think it's -- yes, there -
22 - there are other possible motivations why you

1 -- why you might want to pay that rate. Yes.

2 Q And would one of those motivations
3 potentially be having invested a substantial
4 amount of money in a business even though the
5 current cost structure under the prior ruling
6 was such that they couldn't make money, they
7 hoped that over time they'd be able to
8 increase revenues and decrease costs.
9 Otherwise such that they might be able to make
10 some money in the business?

11 A Well, in general, in economics,
12 some costs that you put in in the past
13 shouldn't influence your -- your future
14 decisions. You should look forward at whether
15 or not the future revenues and future expenses
16 are worthwhile. So, in general, those -- some
17 costs aren't something you should be
18 considering, but yes, let me just leave it at
19 that.

20 Q Okay. But, you don't rule out the
21 possibility that having invested a substantial
22 amount of money in the business, some

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1 webcasters felt that the rate was too high,
2 but they hoped that they could drive their
3 costs like on bandwidth down while they were
4 able to raise advertising revenues or some
5 other form of revenues to the point where they
6 could actually make some money under the old
7 rate. You don't rule that out. Do you?

8 A There may have been other
9 considerations. You know, non-economic
10 considerations, for instance, that they would
11 have factored in that would have been
12 important.

13 Q Was what I just said a non-
14 economic consideration?

15 A Well, you asked if there were
16 other factors and so, I was answering that
17 question.

18 Q Do you know whether any of the
19 webcasters that chose to continue to operate
20 under the old rate did so with the expectation
21 that they would have a subsequent opportunity
22 to seek to lower the rate in a Copyright

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1 Royalty Board proceeding?

2 A Well, I believe that the initial
3 rate was going to be in effect for I think it
4 was -- it was two years or some period of
5 time. So, presumably they would have expected
6 that at the end of that period again there
7 would have -- would have looked at what a
8 willing buyer and willing seller would have
9 paid at that point in time and that the rate
10 would be adjusted to reflect the conditions at
11 that future time.

12 Q Did you consider, sir, that two
13 years after the initial ruling and one year
14 after the Library ruling there was a voluntary
15 agreement between the recording industry and
16 the DiMA webcasters?

17 A Yes, I did.

18 Q Wherein -- wherein the rate was
19 lowered from the prior rate by four percent?

20 MR. SMITH: Objection, Your Honor.
21 That misstates the facts.

22 CHIEF JUDGE SLEDGE: The objection

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1 is that he misstates the facts and given the
2 fact that those facts have not been considered
3 before in testimony, I don't -- I can't rule
4 that it misstates the facts. The objection is
5 overruled.

6 THE WITNESS: Can you restate the
7 question?

8 BY MR. STEINTHAL:

9 Q Yes, I'm just asking you whether
10 you considered in doing your analysis that in
11 2003, the recording industry reached an
12 agreement with DiMA webcasters at a rate that
13 was actually lower than the per-performance
14 rate under the original CARP decision by four
15 percent.

16 A That's not my understanding of
17 what happened.

18 Q Did you consider at all what
19 happened in 2003?

20 A Yes, I did.

21 Q In what respect did you consider
22 the 2003 voluntary agreement in your creation

1 of the rate setting that is literally three
2 times higher than that voluntary agreement?

3 A I considered it in the following
4 sense. That when the voluntary agreement was
5 made subsequently, it was in the shadow of a -
6 - of an upcoming CARP and both parties would
7 consider what the cost would be to litigate
8 and go into arbitration versus the cost of
9 leaving things in place the way they were and
10 my understanding is that they just left things
11 in place and that if there were any
12 significant legal costs, transactions costs or
13 other costs, that that would be weighed
14 against the improvement that either party
15 could expect to have in the rates. In
16 particular, that if the recording industry
17 thought that the appropriate rates should be
18 higher and that a new arbitration would lead
19 to higher rates, they would only go ahead and
20 go with that if that increase in rates was
21 sufficient to cover the additional legal and
22 arbitration costs of doing that which appear

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1 to be fairly substantial judging by the people
2 in this room compared to the revenues that
3 were earned at that time.

4 So, that would suggest that you --
5 you wouldn't be -- you can make -- it wouldn't
6 make economic sense to do that unless you're
7 confident of a fairly large increase in the
8 rates.

9 Interestingly, the same doesn't go
10 for the lowering the rates because you could
11 lower the rates without going through any
12 arbitration just voluntarily. There's nothing
13 that prevents a -- a webcaster and label just
14 agreeing to offer a lower rate. It wouldn't
15 incur all of these costs.

16 So, by looking forward two years,
17 we are able to -- I was able to be fairly
18 confident that there's no evidence that they
19 would lower -- want to lower the rates in a
20 willing market because they could do that very
21 easily. There was -- whereas it would -- it
22 was possible that the optimal rate would be

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1 significantly higher, but not so much higher
2 that it would be enough to compensate for all
3 of the legal costs.

4 So, that helped me understand
5 whether or not the previous rate was set too
6 low or too high.

7 Q Did you ever compare the
8 difference between, not that you mention it,
9 the costs of litigating this case and what the
10 effect of raising the rates by threefold or
11 more under your model would be? Because I
12 think it's a little bit more in the threefold
13 increase than the cost of litigating this
14 case.

15 A I think that currently it -- it's
16 clear that it makes sense for the recording
17 industry to go ahead and incur those
18 transactions costs and the arbitration costs
19 because the disparity has grown so large
20 between what the willing buyer and seller
21 would agree to compared to what the rate had
22 been set at.

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1 Q But, you have no basis --

2 A So, I agree with you.

3 Q Sorry.

4 A So -- so, I agree with you on
5 that.

6 Q You don't have any basis to
7 disagree with the testimony of Mr. Simson of
8 SoundExchange that during the 2003
9 negotiations the webcasters articulated that
10 they felt that the prior rate was too high.
11 Correct?

12 A I haven't seen that testimony. I
13 don't -- you know, if you'd want to provide it
14 to me. So, I don't want to comment on what
15 Mr. Simson may or may not have said, what the
16 context was for that, but if you want to
17 rephrase the question, I'd be happy to answer
18 it without -- without that.

19 Q The reality is you don't know what
20 any of the parties to that negotiation said or
21 thought at the time the negotiation was
22 entered into. Correct?

1 A Wouldn't surprise me at all if the
2 -- if the webcasters wanted a lower rate and
3 the sellers wanted a higher rate. That --
4 that's something that happens every buy and
5 sell negotiation that I've -- I'm -- I'm
6 familiar with. So, certainly, that is what --
7 what each party would want. I'm not
8 surprised, but what actually happens is a
9 function of their bargaining power and the
10 surplus available and the coming to market
11 place. It's not -- it's not what you -- what
12 you want.

13 Q But, you would agree that market
14 forces led to the entering into of that
15 voluntary agreement. Right?

16 A Well, as I -- as I said earlier,
17 it's a factor. The -- we have to weigh those
18 costs against the costs of -- of arbitration.
19 The market, as I think you pointed out
20 yesterday, is relatively small. It was
21 relatively small -- even smaller at that
22 point. Spending, you know, millions of

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1 dollars or whatever it cost for -- for an
2 arbitration. At that point for -- for a
3 relatively small market to raise the rate to
4 closer to what would be appropriate might not
5 be an economically worthwhile decision.

6 CHIEF JUDGE SLEDGE: Dr.
7 Brynjolfsson, your comments referring to a
8 system that has been discarded by the Congress
9 in an arbitration proceeding are not
10 applicable to what we're here today about.

11 BY MR. STEINTHAL:

12 Q Now, Professor, as you said
13 before, if the royalty rate was set too high,
14 you would expect to see some voluntary
15 agreements under that statutory rate. Right?

16 A There are -- certainly, I think
17 that there is every opportunity for that to
18 occur and I would expect that -- that there
19 would be some owners of sound recording
20 copyrights in some circumstances somewhere
21 that would find it beneficial to offer a -- a
22 lower rate if they saw some sort of benefits

1 to doing that, but the extent to which that is
2 not generally done by the -- the major
3 companies that is evidence that they don't
4 find that to be beneficial.

5 Q Well, let's take a look at page
6 nine of your written testimony.

7 A The original?

8 Q Yes.

9 A Yes.

10 Q You said on page nine, did you
11 not, that you would expect --

12 A Where are you?

13 Q At the very top of page nine, the
14 first full sentence. "If the compulsory rate
15 is too high, webcasters do have the option of
16 simply abandoning the market." Talked about
17 that already.

18 A Yes.

19 Q And by the way, that means after
20 having made all the investments, there's some
21 cost you talked about. If the rate was set
22 too high, they had a -- sort of a -- a Hobson

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1 choice. Right. They could abandon the market
2 or just pay it?

3 A Nobody's required to do webcasting
4 or -- or make investments.

5 Q I understand and then you say thus
6 if it were in the interest of the record
7 industry to revive the market, either to earn
8 royalties or because of some perceived
9 promotional benefits, the record companies
10 could and would offer a royalty rate lower
11 than the statutory rate. Right?

12 A Yes.

13 Q So, you would expect that if the
14 rate was set too high, you would see record
15 companies that could and would offer a royalty
16 rate under the statutory rate. Right?

17 A Yes, that's correct.

18 Q And your testimony is you're not
19 aware of any such evidence. Right?

20 A At the time I wrote this, I wasn't
21 aware of any. That's correct.

22 Q Have you become aware of the fact

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1 that a number of record companies have entered
2 into voluntary agreements with Yahoo, for
3 example, with respect to their transmission of
4 sound recordings including those under the
5 statutory license?

6 A It's my understanding that small -
7 - some small indie artists have made
8 promotional arrangements which include
9 downloading and I don't know what other kinds
10 of bundled arrangements in order to promote
11 their music and that in some cases may involve
12 different rates than what are required by the
13 statutory rate. But, it's also my
14 understanding that none of the major labels
15 have made any such agreements for any major
16 artists.

17 Q Well, let's back up a little bit
18 since you seem to know about these agreements.
19 Have you read them?

20 A No, I haven't.

21 Q So, what do you base your
22 understanding of them on?

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1 A I don't know much about them in
2 detail, but I was updated by -- about them a
3 day or two ago by counsel.

4 Q So, you have no first-hand
5 knowledge whatsoever about these agreements.
6 Yet, you just testified the way you did.
7 Right?

8 A I testified what I know.

9 Q And you know it only from what
10 counsel told you because you've never reviewed
11 the agreements or any testimony about them.
12 Correct?

13 A That's correct.

14 Q Now, let's take a look at a couple
15 of these. Okay.

16 A Okay.

17 MR. STEINTHAL: Mark as Services
18 Exhibit 25 an agreement between Acony Records
19 A-C-O-N-Y Records and Yahoo.

20 (Whereupon, the document
21 was marked as Services
22 Exhibit 25 for

1 identification.)

2 JUDGE ROBERTS: Mr. Steinthal,
3 that was Number 25?

4 MR. STEINTHAL: I believe so.
5 Yes. And Exhibit 26 is an agreement between
6 Yahoo and Avant Garde A Clue, Inc.

7 (Whereupon, the document
8 was marked as Services
9 Exhibit 26 for
10 identification.)

11 MR. STEINTHAL: Your Honor, these
12 agreements are marked as restrictive. I'm not
13 going to ask specific questions that go into
14 the economics that would force us to close the
15 courtroom, but I would request that the
16 documents themselves be part of the sealed
17 record. They're restricted documents.

18 CHIEF JUDGE SLEDGE: Mr.
19 Steinthal, I don't have any understanding of
20 the context of what that request means and so,
21 I don't know how I can respond to it.

22 MR. STEINTHAL: Well, Your Honor,

1 all I'm suggesting is that consistent with
2 what we've been doing with respect to
3 restricted information.

4 CHIEF JUDGE SLEDGE: That's
5 something the court reporter does.

6 MR. STEINTHAL: Excuse me.

7 CHIEF JUDGE SLEDGE: That's
8 something the court reporter does.

9 MR. STEINTHAL: Okay. Then I'm --
10 then there would be not need for a motion
11 other than to mark on the record that when we
12 -- when we have a public record that these
13 documents wouldn't be part of the public
14 record.

15 CHIEF JUDGE SLEDGE: And that's
16 something the Court does.

17 MR. STEINTHAL: Okay. So, my
18 motion then, Your Honor, would be --

19 CHIEF JUDGE SLEDGE: So, I don't -
20 - I don't know how to respond to what you're
21 doing because I don't know if the Court is
22 doing anything consistent with what you're

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1 talking about.

2 MR. STEINTHAL: Well, we've had
3 some documents that have been restricted.

4 CHIEF JUDGE SLEDGE: That are
5 filed by the parties.

6 MR. STEINTHAL: Right.

7 CHIEF JUDGE SLEDGE: All right.

8 MR. STEINTHAL: And I guess, Your
9 Honor, I can't remember specifically whether
10 every document that's been taken into evidence
11 so far --

12 CHIEF JUDGE SLEDGE: Has not been
13 restricted.

14 MR. STEINTHAL: Everyone hasn't
15 been restricted?

16 CHIEF JUDGE SLEDGE: There's been
17 no comment prior --

18 MR. STEINTHAL: Okay.

19 CHIEF JUDGE SLEDGE: -- to this
20 comment just now --

21 MR. STEINTHAL: Okay. Fair
22 enough.

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1 CHIEF JUDGE SLEDGE: -- in the
2 context of what you've just raised?

3 MR. STEINTHAL: All right. Then
4 what I'm raising, Your Honor, is the -- in
5 this situation and in others likely to come
6 there will be certain documents offered into
7 evidence that are restricted in terms of how
8 they were produced initially by the parties.

9 As I said initially, I'm going to
10 try to work my way around that in the
11 questioning as much as possible so we have a
12 public record in the transcript of the
13 questions and answers, but to the extent a
14 party has labeled something as restricted, and
15 this is somewhat premature because I haven't
16 offered them into evidence yet, but certainly
17 to the extent that they come into evidence and
18 they're restricted, I think consistent with
19 what the parties have talked about, we'd like
20 to be able to make sure that those documents
21 remain on a restricted record rather than a
22 public record.

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1 MR. STEINTHAL: Your Honor, the
2 protective order does provide for the ability
3 to do so. Just as the --

4 CHIEF JUDGE SLEDGE: We'll have to
5 deal with that. I'm just -- I'm telling you
6 as the present that's something unknown to the
7 Court and it's something we are -- have no
8 process in place and so, I don't know how to
9 respond to the request you made.

10 MR. STEINTHAL: Okay. I'll just
11 work around it then, Your Honor.

12 MR. JOSEPH: Your Honor, Bruce
13 Joseph from Broadcasting. Because Mr.
14 Steinthal confirmed right now, just if I could
15 call the Court's attention while you're in
16 your next recess perhaps to the final sentence
17 of paragraph eight of the protective order
18 which expressly provides that all protective
19 materials that ultimately may be admitted into
20 evidence shall be filed in sealed confidential
21 envelopes or other appropriate containers
22 endorsed to the affect that they are sealed

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1 pursuant to the protective order and that's
2 the order that the Board issued to govern this
3 case.

4 So, I recognize there may not be a
5 process in place, but that is pursuant to the
6 protective order.

7 CHIEF JUDGE SLEDGE: And again, I
8 don't know how that happens, but perhaps a way
9 can be figured out to make it happen. As of
10 right now, there is no way.

11 MR. JOSEPH: Thank you, Your
12 Honor.

13 MR. STEINTHAL: I'm just going to
14 mark one more of these before I question the
15 witness about them. This is an agreement
16 between the Orchard Enterprises, Inc. and
17 Yahoo. It's marked as Services Exhibit 27.

18 (Whereupon, the document
19 was marked as Services
20 Exhibit 27 for
21 identification.)

22 CHIEF JUDGE SLEDGE: Do I get one

1 of those, too, or is that --

2 MR. STEINTHAL: Yes.

3 CHIEF JUDGE SLEDGE: Okay. Thank
4 you.

5 BY MR. STEINTHAL:

6 Q Now, Professor Brynjolfsson --

7 A Um-hum.

8 Q -- are you familiar with any of
9 the entities other than Yahoo that are
10 signatories to these three agreements?

11 A No, I've never heard of them.

12 Q Do you know that the Orchard is
13 one of the largest independent record
14 companies in the world?

15 A No, I didn't know that.

16 Q Are you familiar with the fact
17 that under these agreements more than
18 promotional uses are covered, but addition
19 prices are set for on-demand streaming
20 associated with Yahoo's business relating to
21 on-demand --

22 A Excuse me. Familiar with these

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1 agreements that you just handed me?

2 MR. SMITH: I'm going to object to
3 the question, Your Honor. He's already
4 testified he hasn't seen these agreements and
5 now he's -- and he asked whether he's familiar
6 with the terms of the agreements. It's just
7 counsel testifying about documents not in
8 evidence.

9 CHIEF JUDGE SLEDGE: Mr.
10 Steintal.

11 MR. STEINTHAL: Well, Your Honor,
12 you know, before he said anything, he said he
13 would -- you know, he characterized these
14 agreements in a certain fashion, of course,
15 based on what he was told by counsel. I'm
16 asking him some questions about whether
17 looking at these documents helps him better
18 understand what, in fact, the scope of these
19 agreements are in comparison to what he
20 initially testified they were.

21 MR. SMITH: He's just been
22 presented with 45 pages of single-spaced

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1 contracts and asked to comment on the terms of
2 the agreements that he's never seen. I don't
3 think it's appropriate. If they want to give
4 them to the witness and give him some time to
5 analyze the documents, that would be one
6 thing, but they're not part of his testimony.
7 He's never seen them before and I don't think
8 you can ask a witness to comment on the terms
9 of the documents particular when they're not
10 in evidence and no foundation has been laid
11 for what they are.

12 CHIEF JUDGE SLEDGE: Mr. Smith,
13 I'm going to let Mr. Steinthal have a little
14 freedom here and we'll see how it goes and see
15 if that results in your concerns.

16 BY MR. STEINTHAL:

17 Q Without looking at the documents,
18 I gather you have no basis upon which to
19 testify as to whether they cover more than
20 promotional transmissions of music. Correct?

21 A I don't know the details of the
22 agreements. That's correct.

1 Q And hypothetically, if in fact,
2 Yahoo entered into voluntary agreements with
3 the Orchard and several other independent
4 record companies that covered statutory
5 license streaming as well as other kinds of
6 on-line music delivery, that would be
7 something that you economically would want to
8 look at in your analysis. Would you not?

9 A I think -- yes, I think that would
10 be useful. Let me just say that I think that
11 would -- number one, that would prove my point
12 that it's perfectly possible for copyright
13 owners to make agreements with labels at less
14 than level. That -- that that is a mechanism
15 for addressing prices that are low, but in
16 converse, it's not true that if they wanted to
17 have a price higher that they wouldn't be able
18 to. So, to the extent that these actually
19 exist, I think it's very helpful. Because
20 previously, it was just a -- a logical
21 conclusion I came to. Now, we have evidence
22 that, in fact, it is possible to enter an

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1 agreement at lower than the market according
2 to what -- what -- the way you described.

3 Secondly, I would -- although it
4 would be interesting to look at them and I
5 look forward to doing that, I would be
6 hesitant to put a lot of weight on some, you
7 know, indie label or -- or anything. Just as,
8 you know, previously that the -- the ruling
9 was that the -- when the -- when the -- when
10 the rate was set back in 2002, the -- the
11 judges decided not to put weight on agreements
12 between the labels and small independent
13 webcasters. They rejected. Said we should
14 focus on the larger ones I understand. I
15 think that would -- that same reasoning would
16 apply here. I don't know how sophisticated
17 these guys are. Know what the norms are in
18 this business. It may well -- Yahoo's a very
19 sophisticated company. They're a giant
20 company of very -- although I assume they have
21 very astute negotiators and I don't know
22 whether these particular artists in indie

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1 labels were a -- a -- knowledgeable about all
2 the things that they need to be knowledgeable
3 about.

4 And, thirdly, I just glanced at
5 them very briefly and it appears that -- that
6 there is -- this isn't just for webcasting.
7 This is some sort of a bundled package of --
8 of a whole set of -- of services and -- and
9 exchanges that are going on and to the extent
10 there's a whole bundle, you can make tradeoffs
11 where you get benefits in one part and give up
12 something in another part. So, that would
13 make it risky to focus just on -- on one
14 element of it.

15 Q Well, let's -- now that you've in
16 your quick review raised several issues, let's
17 probe your answer.

18 I believe you used the word the
19 rate too low in that answer and that confused
20 me. Because your prior testimony was that if
21 the rate were set too high you would expect
22 sound recording owners to enter into voluntary

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1 agreements under the statutory rate. Right?

2 A If I said too low, I mis-spoke.

3 Q Now, in terms of the bargaining
4 leverage between Yahoo and the Orchard for
5 example, let me ask you this, sir. If the
6 Orchard or any of the other independents did
7 nothing, they would get the statutory rate
8 when it comes to statutory license streaming.
9 Correct?

10 A As I mentioned, it appears to be a
11 whole set, a complicated agreement, a set of -
12 - of provisions. I don't know -- if they did
13 nothing, I don't know that they would get all
14 the things that they're getting here.

15 Q That wasn't my question. As to
16 statutory streaming, if any of these indie
17 did nothing and Yahoo used their music on
18 their service, they would get whatever the
19 statutory rate is. Right?

20 A Yes, that's my understanding.

21 Q So, economically, you would not
22 expect any of these labels to license Yahoo at

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1 under the statutory rate for statutory
2 webcasts unless they perceived they were
3 getting some other benefits.

4 Meaning the independent labels were getting
5 some other benefits that justified them taking
6 less than the statutory rate. Correct?

7 A If they were knowledgeable and
8 sophisticated negotiators, that would be
9 correct.

10 Q And some of those benefits at
11 least hypothetically could be promotional
12 benefits that they perceive associated with
13 air play on the Yahoo webcasting service.
14 Right?

15 A Hypothetically, yes.

16 Q Now, you mentioned that you were
17 unaware of any agreements between any of the
18 webcasters, any of the major record companies
19 under the statutory rate. Correct?

20 A That's correct.

21 Q You're familiar with the fact that
22 two major labels, Universal and Warner Music

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1 Group, have entered into voluntary agreements
2 with Yahoo that covers their statutory
3 streaming activity.

4 A No, I'm not.

5 Q So, you didn't think it was
6 worthwhile in reviewing the transactions that
7 are being entered into in this very
8 marketplace to look at voluntary agreements
9 entered into between Warner Music Group on the
10 one hand and Yahoo and Universal Music Group
11 on the other hand and Yahoo, two of the four
12 majors?

13 A I didn't say that. I said I
14 wasn't aware of it.

15 Q And that's not one of the things
16 counsel told you to look at?

17 A I did extensive research. I have
18 a number of people help me with that research.
19 We reviewed that yesterday. Those -- what you
20 just mentioned is not something that I
21 encountered before I wrote my report.

22 Q Well, you seem to quote Mr.

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1 Roback's deposition quite a bit. You didn't
2 see in Mr. Roback's deposition his testimony
3 about those two agreements?

4 A I don't -- I don't recall that.
5 No.

6 Q Now, hypothetically since you
7 haven't seen them, I'm going to ask you to
8 assume that Universal Music Group and Warner
9 Music Group each entered into an agreement
10 with Yahoo on a lump sum basis whereby it
11 didn't matter how many times a Universal
12 recording or a Warner recording was played on
13 a statutory webcast station. They were going
14 to get the same amount of money. The labels
15 were going to get the same amount of money.

16 You would agree with me wouldn't
17 you in that context that such an arrangement
18 would incentivize Yahoo economically to play
19 as much Universal music or Warner music as
20 possible. Right?

21 A Yes, I think that would be the --
22 the incentives.

1 Q And that's because from an
2 economic perspective, Yahoo wouldn't be paying
3 anymore for the marginal or incremental plays
4 of Universal or Warner music and indeed, it
5 would be paying less under the statutory
6 license because under the statutory license
7 scheme, you'd deduct from what you would
8 otherwise pay what's called directly licensed
9 recordings. Right?

10 A Based on this hypothetical, that
11 seems to make sense to me.

12 Q And hypothetically, if Universal
13 or Warner perceived that there was promotional
14 value in the playing of their songs on the
15 Yahoo's webcast services, this arrangement
16 would benefit them, too, precisely because of
17 the economic incentive it would be creating
18 for Yahoo to play more of their tracks.
19 Right?

20 A Well, I don't know what this lump
21 sum amount is. I mean it seems to me if it's
22 a very large lump sum, you'd be willing to do

1 it even if it were -- had other costs.
2 Presumably, they looked at the lump sum and
3 decided that it was sufficient to cover the
4 costs, the damage that might be done from --
5 or, you know, that was something that they
6 thought was a -- a worthwhile thing to do.
7 But, you know, in the abstract, all we know is
8 that they got the large sum of money in
9 exchange for letting -- you know, it's
10 hypothetical. In exchange for letting a
11 webcaster broadcast their music.

12 Q And you'd agree with me that this
13 kind of arrangement is inconsistent with the
14 model you've created in terms of how a willing
15 buyer and a willing seller would ultimately
16 arrive at a price.

17 A No, it's not.

18 Q Well, it's not a greater of a
19 percentage of revenue or a certain amount per
20 play. Is it? In this hypothetical or it's a
21 lump sum agreement.

22 A It's not, but my model isn't based

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1 at all on a per play royalty. My model is
2 based on calculating the revenues and the cost
3 and the surplus generated and making estimates
4 of how much of that surplus exists and then
5 dividing it between the parties. There are
6 lots of ways you could divide that surplus
7 between the parties. I mean there are
8 tradeoffs that need to be made in terms of
9 risk sharing. If you give a lump sum amount,
10 in some ways that's riskier for -- for some of
11 the parties because if things turn out very
12 differently than what they anticipated, then,
13 you know, Yahoo might get stuck with paying
14 more than they would at the other rate or
15 maybe the labels would have gotten less than
16 they would have gotten the other way. So,
17 there may be, you know -- there may be a
18 number of ways you can divide up the surplus
19 that get -- that get to comparable levels of
20 economic value.

21 I lay out ones that were
22 consistent with the predominate approach that

1 companies have been taking so far, but I -- I
2 wouldn't rule out as an option if -- if labels
3 and webcasters wanted to come to an agreement
4 for lump sum amounts and sort of buy out parts
5 of it. That would be perfectly consistent
6 with my model.

7 Q Because your -- your model is, as
8 you say, neutral as to the framework in which
9 the money is exchange. You're just trying to
10 come up with an economic amount that you
11 believe would result from the application of
12 your model. Correct?

13 A That's essentially correct.

14 Q So, for example, there's nothing
15 economically that you'd be opposed to if we
16 ended up with a percentage of revenue rate
17 structure in this case with a lump sum minimum
18 payment per quarter, for example, that the
19 licensee would have to pay?

20 A Well, there are -- as I mentioned,
21 there are some risks to doing that. If -- in
22 particular, there's some risks to the labels

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1 that if the webcasting industry takes off even
2 faster than I projected and based on the most
3 recent discovery, it appears that it is
4 growing even faster than I projected, then the
5 labels would be leaving -- might be leaving
6 some money on the table if they did that.
7 But, certainly, I would -- I would have no
8 problem that if the labels chose to divide the
9 surplus using some other mechanism and -- and
10 -- and buy out this agreement, that that would
11 be a perfectly reasonable thing to do that the
12 willing buyers and sellers could -- could
13 agree on.

14 MR. STEINTHAL: Your Honor, I'm
15 about to go to a different subject. So, if
16 you want to take our morning break, that would
17 be a perfect time to do it.

18 CHIEF JUDGE SLEDGE: We will
19 recess at this point and return in ten
20 minutes.

21 (Whereupon, at 10:48 a.m. off the
22 record until 11:02 a.m.)

1 CHIEF JUDGE SLEDGE: Thank you.
2 We'll come back to order.

3 MR. STEINTHAL: Thank you, Your
4 Honor.

5 BY MR. STEINTHAL:

6 Q Professor Brynjolfsson, now to the
7 -- now to the analysis that you did.

8 First, I want to be as precise as
9 we can be as to the data sources upon which
10 you relied for your cost and revenue
11 assumptions and your volume of streaming
12 assumptions all of which you would agree are
13 critical to the models. Right?

14 A Yes, that's correct.

15 Q Now, if I heard you correctly in
16 your direct, the primary basis for the cost
17 component of your model in your written direct
18 testimony was the Ting and Wildman report.
19 Correct?

20 A That's not exactly correct.
21 That's a -- the key input to the fixed-cost
22 component which is actually the less important

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1 part of the cost and that was in part
2 corroborated by Radio and Internet Newsletter
3 which stated a number that was about half of
4 the ones that I was using and my own judgment
5 in what it takes to set up a -- to -- to do
6 webcasting services.

7 Q What -- be specific here because I
8 think it's very, very important. Other than
9 the Ting and Wildman report, what specific
10 source materials did you use not for
11 corroboration, we'll come back to that, for
12 establishing the cost assumptions in your
13 model? Other than Ting and Wildman, what
14 source materials did you use?

15 A For the fixed cost, I based them
16 on the Ting and Wildman data because those
17 were higher than the other data that I had
18 from the Radio and Internet Newsletter. So,
19 I chose the -- the -- the higher ones that I
20 had available.

21 Q So, again, other than the Ting and
22 Wildman report which you used for your cost

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1 assumptions, was there any other data source
2 that you used for the cost assumptions
3 associated with your model?

4 A Again, I used those for the fixed-
5 cost assumptions and --

6 Q And what data sources specifically
7 did you use for the variable-cost assumptions
8 in your model?

9 A They're all documented in my
10 report in great detail, but Streaming Media
11 was key input for the -- for the -- what is
12 the bandwidth costs and I looked at those and
13 I compared those to the Live365 data as well
14 that we were provided with.

15 Q And when you say the Streaming
16 Media, you mean AccuStream?

17 A Let me give you the exact citation
18 here. So, AccuStream 2003 was a key source as
19 was Hoch and Rayburn that's provided in the --
20 AccuStream 2003 and Hock and Rayburn 2005 were
21 the data sources I referred to.

22 Q Did you actually use the latter

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1 source for your -- any of the numbers or did
2 you rely entirely in that respect on the
3 AccuStream data?

4 A The numbers I used in the report
5 were from AccuStream, but as we established
6 yesterday, they turned out to be much higher
7 than the data we found in discovery.

8 Q I'll let you, I promise, come back
9 and talk about what discovery showed, but in
10 terms of creating your written report upon
11 which your models are based, if I hear you
12 correctly, the cost assumptions are based
13 entirely on two sources, Ting and Wildman and
14 AccuStream. Correct?

15 A I don't think that's a fair
16 characterization. I looked at a variety of
17 sources. I chose the ones that I thought
18 would be most reliable and that were
19 conservative and specifically, the numbers
20 that I used for fixed cost are based on Ting
21 and Wildman and the numbers that I used for
22 bandwidth based on AccuStream.

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1 JUDGE WISNIEWSKI: Can I get a
2 point of clarification? When you say they
3 were based on these sources, does that mean
4 they were constructed from data found in those
5 sources or were actual data in those sources?

6 THE WITNESS: Those are the actual
7 numbers that they provided which were higher
8 than the numbers taken from Radio and Internet
9 Newsletter, but -- so, to be specific, I take
10 those -- use those precise numbers.

11 JUDGE WISNIEWSKI: You use the
12 actual data?

13 THE WITNESS: Yes.

14 JUDGE WISNIEWSKI: Thank you.

15 BY MR. STEINTHAL:

16 Q Now, also to be precise, in
17 constructing your model, I think you testified
18 on direct that the Ting and Wildman data
19 addressed on their face the cost
20 characteristics of a webcaster or a certain
21 size. Correct?

22 A They gave a range of sizes.

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1 Q But, in order for you to make
2 estimates of the costs for larger webcasters,
3 you did some sort of regression analysis.
4 Right?

5 A Yes, that's essentially correct.
6 Yes.

7 Q The numbers --

8 A Okay. Yes. Yes, that's
9 essentially correct.

10 Q Your model then to be clear in
11 addressing the Judge's question took data from
12 Ting and Wildman's report, but then you
13 applied a regression analysis in order to get
14 to the cost numbers you used in your models.
15 Right?

16 A No, that's not accurate. I used
17 the actual Ting and Wildman for the column
18 that's labeled for 2001 and then for webcasts
19 of different sizes as I labeled, then I used
20 a -- the forecast function.

21 Q Wait a minute. You testified
22 under oath it was a regression analysis.

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1 A Yes, that's a regression analysis.

2 Q So, I don't think we're
3 disagreeing with each other. You took the
4 numbers from Ting and Wildman for 2000 to 2002
5 applicable to a certain size of webcaster and
6 then you did your own regression analysis in
7 order to get the cost numbers that you used in
8 your models. Right?

9 A I used -- no, I used the Ting and
10 Wildman numbers for the year that they
11 provided them for and that was part of my
12 model for -- for model one, I needed cost
13 numbers for 2001. Those were available. I
14 used those. For other years, for other sizes
15 of webcasters, I used as I described in -- in
16 my testimony a regression analysis. Yes.

17 Q Yes, but a regression analysis
18 based on the original Ting and Wildman. Then
19 you --

20 A Correct.

21 Q Right. Okay. Now, your direct
22 testimony does not contain a copy of that

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1 regression analysis. Correct?

2 A My understanding is we provided a
3 -- a copy of it to you.

4 Q What do you base that
5 understanding on?

6 A I believe that when I was deposed,
7 I -- we were -- you -- I -- I was asked for --
8 to provide a copy and we did.

9 Q Would it surprise you that we
10 didn't get a copy of the regression analysis?

11 A Yes, that would surprise me.

12 Q But, clearly, it's not part of
13 your direct testimony. Right?

14 A What's not part of my direct
15 testimony?

16 Q The regression analysis itself is
17 not made part of your direct testimony. It's
18 not an exhibit to it. Yes or no?

19 A The results are in the testimony,
20 but all of the -- all of the underlying
21 details are not in the testimony.

22 Q Now, let's talk about the

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1 AccuStream. Actually, before we get there,
2 let's stick with Ting and Wildman on the cost
3 considerations. Okay.

4 MR. STEINTHAL: And feel free to
5 take a look at the Ting and Wildman report
6 which Your Honors have from the beginning of
7 today and yesterday. Sort through the pile.
8 It's Services Exhibit 13 -- 16? Fifteen.

9 BY MR. STEINTHAL:

10 Q Now, in terms of the costs that
11 you used from the Ting and Wildman report, for
12 purposes of your modeling or your regression
13 analysis, one or the other, I'd like you to be
14 as precise as you can be for the panel as to
15 what, in fact, were the cost categories that
16 the Ting and Wildman report addressed?

17 A Personnel, bandwidth and
18 equipment.

19 Oh, so, that was what the report -- their
20 report addressed. We used it for the
21 personnel and equipment categories.

22 Q Okay. By equipment, does that

1 include servers, routers?

2 A Yes, that's correct.

3 Q Is there anywhere in the report
4 that makes it clear what equipment is included
5 within the equipment category?

6 A Well, there's a -- an appendix
7 that isn't provided here that went into some
8 more detail I believe, but see if I can find
9 the text to this part. Yes, it -- it -- it
10 describes equipment as -- as hardware and
11 software and networking gear, technical
12 personnel and technical personnel.

13 Q What are you looking at, sir?

14 A This is at page seven and then as
15 -- this is in the paragraph in the middle
16 under the word cost analysis. Sort of towards
17 the middle there's a sentence that says "We
18 sort technology distribution costs into three
19 principal cost components, streaming
20 equipment, hardware/software/networking gear,
21 technical personnel and transmission costs."
22 More information about the cost components can

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1 be found in Appendix 3 which isn't included
2 here, but which we looked at -- which I looked
3 at as well.

4 Q But, it wasn't part of your direct
5 testimony. Was it? Appendix 3.

6 A I'm not sure what you mean by part
7 of my direct testimony.

8 Q It wasn't attached with your
9 direct testimony. Was it?

10 A I -- I don't recall.

11 Q Let's take a look at the very
12 paragraph you refer to here.

13 A Yeah.

14 Q "For our purpose of analyzing the
15 technology characteristics and the
16 corresponding constraints imposed on
17 webcasting, we focus on technology
18 distribution costs" and that says "and assume
19 other costs."

20 A Um-hum.

21 Q Is your understanding that Ting
22 and Wildman basically just assumed these other

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1 costs?

2 A Well, you didn't read the whole
3 sentence. Do you want me to finish what they
4 assumed?

5 Q I'm happy to read it. "And assume
6 other costs such as production of programming,
7 sales and marketing, administration, overhead,
8 et cetera are the same for webcasters and
9 broadcasters with the same sizes of audience."

10 A Yes, that's what they assumed.

11 Q So, let me get this right. Your
12 understanding is that Ting and Wildman didn't
13 have webcaster costs. So, they made
14 assumptions based on over-the-air radio costs?

15 A For certain categories, that's
16 correct.

17 Q Which of the categories did they
18 make assumptions based on some other media
19 company's costs rather than webcasting costs?

20 A Programming, sales and marketing,
21 administration and overhead.

22 Q Did you do any analysis of the

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1 underlying data in connection with the Ting
2 and Wildman report to try to analyze the
3 differences between over-the-air broadcasters
4 and webcasters with respect to the specific
5 cost issues that are addressed by Ting and
6 Wildman?

7 A Yes, it was consistent with what I
8 read in the rest of my research. For
9 instance, Kurt Hansen's Radio and Internet
10 Newsletter described what it would cost to set
11 up a webcaster of I believe it was 10,000
12 average quarter hours and it was about half of
13 these values. Also, at another point, there
14 was a -- an estimate and I don't have the
15 source off the top of my head that the total
16 costs including fixed costs in with all other
17 costs would be less than two cents per hour
18 since we knew that the royalty costs were over
19 one cent per hour and the bandwidth was about
20 a cent. That also was consistent with an
21 estimate of what the fixed costs would be.
22 Those other sources were pointed to fixed

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1 costs that were less than the ones that I used
2 in the model and it was consistent with my own
3 experience in having it -- setting up web
4 servers and running web operations, having my
5 students set them up in -- in terms of what it
6 cost to run a site and -- and provide web
7 services.

8 So, based on all of those factors,
9 I felt comfortable with these numbers.

10 Q Let's take that answer and chop it
11 up a little bit. Shall we? You're telling us
12 that you relied on cost that you incurred in
13 setting up a web service personally or a web
14 operation personally or what your students did
15 in determining that the Ting and Wildman cost
16 analysis was accurate and reliable for this
17 project?

18 A Yes, I'm a professor at MIT who
19 teaches about the Internet. I created a first
20 course on marketing in the Internet in e-
21 commerce and in the -- in that course, it's my
22 job to be an expert on this material. I've be

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1 teaching for a decade. I've taught a similar
2 course at Stanford University and part of what
3 I did in -- in the early years of that course
4 is I asked students to set up their own web
5 operations. I asked them to go through and
6 for their class reports, analyze the cost
7 structure of various web-based companies,
8 their technology costs, the other sorts of
9 costs, the revenue possibilities. I saw
10 probably dozens of presentations that MBA
11 students -- perhaps hundreds of presentations
12 that MBA students at Stanford and MIT did when
13 -- many of them went off and started some of
14 the kinds of companies that we're describing
15 here.

16 I've done research on this. I've
17 written a number of papers on this topic and
18 I drew on that expertise when I produced this
19 report. I mean I could go into more detail,
20 but that's probably sufficient.

21 Q That's not sufficient for me,
22 Professor.

1 A All right.

2 Q Unless you can tell me that you
3 actually have operated Internet radio service,
4 operating under the statutory license -- you
5 haven't. Have you?

6 A No, I have not.

7 Q So, all of the things you just
8 referred to -- by the way, none of what you
9 just referred to is referenced as data
10 supporting your cost analysis for your model.
11 Right? Yes or no? It's not in a report. Is
12 it?

13 A As I reiterated, I looked at all
14 the data that I was able to get from a variety
15 of sources. I identified specific numbers
16 that I considered to be reliable. It's my job
17 to use my expertise based on my job -- my --
18 my -- my career as a professor to make
19 assessments as to whether or not those are
20 reasonable. Because I know that the basic
21 costs of delivering bits over the Internet
22 don't vary depending on what the content of

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1 this bits is in a substantial way, I'm able to
2 draw on that expertise.

3 One of the nice things about the
4 Internet is a bit is a bit is a bit as it --
5 as it streams over there. Whether it's a --
6 a bit describing an audio file or video file
7 or other types of bits, the same routers deal
8 with them. The same basic technology is
9 applied. That's part of the power of the
10 Internet and that's part of why you can't make
11 inferences about what the costs are of
12 delivering bits without having to have a
13 different knowledge of bits that are meant to
14 represent one type of information versus
15 another type of information.

16 Q I think the easy answer was that
17 you've never been involved in or operated an
18 Internet radio service. Correct?

19 A I've already answered that
20 question.

21 Q Well, I don't think so, but I'll
22 move on. But, you would agree with me would

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1 you not, that the Ting and Wildman cost
2 analysis relies on the assumption that
3 programming, sales and marketing,
4 administration and overhead costs are the same
5 for webcasters and broadcasters with the same
6 sizes of audience?

7 A I've already answered that
8 question at least twice. Yes.

9 Q And those are the cost assumptions
10 as you said that you relied on.

11 A Yes again.

12 Q Now, what about capital
13 expenditures? The yearly amortized cost of
14 capitalized expenditures that a business may
15 have. Where is that, if at all, in the cost
16 analysis that Ting and Wildman did?

17 A Hardware and networking gear are
18 almost always considered capital expenditures.
19 In some cases, software's considered a capital
20 expenditure as well.

21 Q As you sit here today under oath,
22 are you going to tell us that you know Ting

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1 and Wildman included in their analysis here
2 capital expenditures?

3 A It's my understanding based on
4 what they reported that they included those
5 capital expenditures I just referred to.

6 Q Under what particular category?
7 As one of the assumed costs that would be
8 comparable to a broadcaster?

9 A No, as -- as I just said, hardware
10 and networking gear, it's the sentence that I
11 read earlier, is one of the cost components
12 that they included.

13 Q It's your testimony under oath
14 that you believe that reference to hardware,
15 software and networking gear includes capital
16 expenditures? Can you really say that under
17 oath?

18 A As I just mentioned, hardware and
19 software -- hardware and networking gear are
20 generally considered capital expenditures.
21 Software sometimes is considered a capital
22 expenditure. There are different rules that

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1 the generally accepted accounting principles
2 apply to software depending on the way that
3 software's purchased and constructed and
4 companies have some discretion exactly how
5 they capitalize software expenditures. There
6 are some companies that expense most of their
7 software expenditures. Many companies do
8 that, but there are many companies that
9 capitalize their software expenditures as
10 well.

11 Q And my question to you is since
12 you didn't go back and look at the underlying
13 work product of Ting and Wildman -- you didn't
14 do that. Right?

15 A That's the opposite of what I
16 said. I said I -- I referred to -- I looked
17 at Appendix 3 which provides the additional
18 details.

19 Q Does Appendix 3 tell you whether
20 the capitalized expenditures of a company that
21 has made significant investments were included
22 as part of --

1 A It provides additional detail. As
2 I said, hardware is a capital expenditure.
3 Networking gear is a capital expenditure. So,
4 I'm confused about why you keep asking that
5 question.

6 Q I'm trying to find out whether all
7 of the costs of a webcaster are actually
8 included in the cost analysis that Ting and
9 Wildman did and I'm just asking you --

10 A All of the relevant costs are
11 included. Yes. All of the relevant fixed
12 costs.

13 Q Now --

14 A And this is corroborated by the
15 other evidence that I referred to already.

16 Q Let's be clear here as to the RAIN
17 report that you're talking about.

18 A Um-hum.

19 Q And that corroborates your -- your
20 evidence. Okay.

21 A Um-hum.

22 MR. STEINTHAL: Mark it as

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1 Services Exhibit 28. An article produced by
2 SoundExchange. This bears the Bates stamp
3 numbers SX8235 to 8243.

4 (Whereupon, the document
5 was marked as Services
6 Exhibit 28 for
7 identification.)

8 BY MR. STEINTHAL:

9 Q Is this the RAIN, Radio and
10 Internet Newsletter Report to which you
11 referred?

12 A It's one of them. There's another
13 one as well.

14 Q When you were referring to an
15 industry source about cost being of a
16 magnitude, is this the one you were referring
17 to?

18 A No, it's not.

19 Q So, you didn't rely on this at
20 all?

21 A This is another piece of evidence
22 that -- that adds to -- it's not the one I

1 happened to have mention before, but this one
2 also supports my case. If you like, I can
3 point you to the part that --

4 Q I think I can get us there.

5 A Okay.

6 Q You're referring to on the second
7 page where this Radio and Internet Newsletter
8 reports on its website "Industry experts have
9 agreed that a webcaster getting an average of
10 two cents for every listener hour whether
11 through advertising or subscriptions should
12 easily be profitable." In other words, two
13 cents per hour should cover streaming, royalty
14 obligations and miscellaneous operations costs
15 incurred for each listening hour?

16 A That's an additional piece of
17 evidence. Yes.

18 Q But, you don't know what analysis
19 was done underlying this. Do you?

20 A Well, it says right here this is
21 his summary of what industry experts agree to.

22 Q Right. You don't know who those

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1 industry experts are?

2 A No, I don't.

3 Q And you don't know what analysis
4 was done other than what we just read in that
5 paragraph. Right?

6 A I don't know any details of
7 analysis that was done. No.

8 Q And you say this isn't the one you
9 relied
10 on, but take a look at page 12 of your written
11 testimony.

12 A Um-hum. Familiar with that.

13 Q Isn't this the precise quote that
14 you relied upon in your written direct
15 testimony as corroborative?

16 A As I mentioned, this is one of
17 them. The one that you asked me about
18 earlier, I referred to Radio and Internet
19 Newsletter 2003 which he said "For instance,
20 a webcaster with 8,000 AQH would incur monthly
21 personnel and other fixed costs exclusive of
22 sales and marketing of approximately \$10,000."

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1 So, that is the one that I had in mind in my
2 earlier reference, but you pointed out another
3 one that makes a similar point and if you look
4 at the testimony, there --

5 Q And where are you reading --

6 A -- are a number of other
7 references to --

8 Q -- where are you reading from,
9 sir?

10 A Okay. So, the one that -- the
11 other one that I was referring to is on page
12 14. If you go towards the bottom of the page,
13 it's the second to last sentence of page 14.

14 Q Right. Okay. And as you say,
15 this is reporting on certain costs for a
16 webcaster that has an AQH of 8,000. Remind
17 the panel what an AQH is?

18 A Average quarter hour.

19 Q And in terms of the large
20 webcasters that your testimony addresses here,
21 they have an AQH of over 35,000. Is that
22 right?

1 A Generally, substantially larger
2 than this and they generally have economies at
3 scale -- I believe they have said that they
4 get economies from being larger in their Power
5 Point presentations that they provide as
6 evidence. In Roback's testimony, he says that
7 one of the benefits of being larger is you get
8 economies at scale and generally can do things
9 at a lower cost than a -- a smaller webcaster
10 per average quarter hour.

11 Q Professor, we'll be out of here
12 quicker if when I ask you a question like does
13 a larger webcaster have an AQH of about
14 35,000, you say yes or no rather than adding
15 onto another few minutes of self-serving
16 testimony.

17 A I think my job is -- is to try to
18 make sure that everybody understands and makes
19 things as simple as possible rather than
20 obscuring things and it would be misleading if
21 people thought that this estimate right --
22 that is listed here isn't a -- isn't likely to

1 be higher than what it would be for the other
2 sorts of companies and I see my job as making
3 sure that people have the relevant facts in
4 front of them and I wanted to make that the
5 questions sometimes don't lead to a
6 misunderstanding of those facts.

7 Q My job, too.

8 A Good.

9 Q So, with respect to this RAIN
10 Newsletter that you rely on here, again, it
11 relates to a webcaster with 8,000 AQH and not
12 larger webcasters specifically. Correct? Yes
13 or no?

14 A Correct.

15 Q And it refers to monthly personnel
16 and other fixed costs exclusive of sales and
17 marketing.

18 A That's correct.

19 Q So, it doesn't address what the
20 sales and marketing costs would be. Right?

21 A That's correct.

22 Q And in terms of monthly personnel

1 and other fixed costs, that doesn't include
2 capital expenditure costs, does it?

3 A My understanding is that yes, it
4 does.

5 Q It does?

6 A My understanding is that yes, it
7 does.

8 Q Your testimony under oath is that
9 what RAIN was referring to included amortized
10 capital expenditures of a company? Do you
11 know that as a matter of fact?

12 A My understanding is that yes, it
13 does.

14 Q And what's your understanding
15 based on?

16 A That's the common definition of
17 fixed costs.

18 Q Okay. Other than your belief that
19 the common definition of fixed costs includes
20 capital expenditures, you have no other basis
21 upon which to conclude that this newsletter
22 was actually including capital expenditures.

1 Right?

2 A I think you'd be hard pressed to
3 find some -- well, let me just say that the
4 common definition of fixed cost includes
5 capital expenditures.

6 Q It's not on your fix-cost chart.
7 Is it?

8 A Yes, it is.

9 Q Where?

10 A The computer equipment that I
11 refer to as a capital cost.

12 Q Your testimony is that the fixed-
13 cost line on your Table 1 includes capital
14 expenditures that webcasters made in their
15 business?

16 A It includes the necessary capital
17 expenditures in order to provide webcasting
18 services. Yes, that is my testimony.

19 Q Did you ever talk to Mr. Hansen or
20 anyone at RAIN about what the underlying
21 documents or data were that supported the
22 statement you quoted on this page of the

1 report?

2 A No, I did not.

3 Q Did you do any investigation
4 whatsoever about what the actual data was
5 underlying the statement in this newsletter?

6 A Well, in addition to the various
7 corroborative sources that I reviewed, in the
8 case of him in particular, I read I don't know
9 how many of his newsletters, dozens, hundreds
10 of them and I was able to get an assessment
11 based on what he had written elsewhere as to
12 his knowledge of the industry and -- and the
13 time he spends talking to industry experts,
14 the people he quoted, the conferences that he
15 went to, his interactions, his own personal
16 experiences as described in great detail and
17 that -- and that combined with the fact that
18 his numbers were consistent with what I saw
19 elsewhere made me feel that it was
20 sufficiently relevant and reliable that I
21 would list it as one of the many sources in my
22 report.

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1 Q But, again, the answer to the
2 question of whether you did any independent
3 analysis of the underlying data or requested
4 any of the underlying data to support the
5 statement in that newsletter is no, you
6 didn't. Correct?

7 A No, that's not my answer. I can
8 summarize my answer by saying --

9 Q Not if it's going to be the same
10 thing again, Professor.

11 A I'll try and summarize it more
12 briefly. He -- he refers to leading experts
13 that he spoke to. I saw from reading his
14 newsletter that he frequently quotes large
15 numbers of leading experts, CEOs of companies,
16 people at companies and it -- unless he
17 fabricated all of his newsletters which seem
18 to be -- to be unlikely, it appeared that he
19 did, in fact, speak to leading experts and,
20 therefore, that gave me sufficient basis that
21 I thought that when he referred to what
22 leading experts were saying that there was

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1 some foundation for that.

2 Q Let me go back. As you sit here
3 today, do you have any basis as a matter of
4 fact to testify based on what you've read or
5 what you looked at that underlies that
6 statement in the RAIN report as to what
7 specific costs were actually included in the
8 data about which the statement is made?

9 A Well, he's very specific. The
10 cost of the personnel and other fixed costs
11 exclusive of sales and marketing.

12 Q And that's all you know about it.
13 Right? You don't have any other information
14 about how that cost calculation was made.
15 Fair statement?

16 A It's not clear it was a cost
17 calculation. I think that this was his
18 reporting of what a number of experts had
19 concluded.

20 Q And you had no specific additional
21 factual information beyond what was reported
22 in that article about those costs. Right?

1 A Yes, I did.

2 Q About what he says there.

3 A I also looked at what the costs
4 were based on my students setting up similar
5 services and based on what was reported in
6 other sources and they were comparable to the
7 costs that he reported. So, based -- so,
8 looking at -- at similar data, I came to
9 similar conclusions.

10 Q Familiar with the phrase out-of-
11 range sample, sir?

12 A Yes.

13 Q What does that mean?

14 A Well, if you have a sample of
15 points, when you want to know what the effects
16 would be in other ranges, what you do is you
17 often run some kind of regression or forecast
18 analysis to consider what the values would be
19 outside of the range for data points.

20 Q And are there parameters
21 economically speaking on what's -- how far you
22 can go to fairly take a sample of X size to

1 use it as a barometer for economic information
2 about a company that's Y size?

3 A Yes, what you'd want to do is have
4 some confidence that the underlying factors
5 and principles that are affecting the data
6 that you're looking at also apply to the data
7 that are outside of that range.

8 Q Are there general parameters and
9 economics as to how far you can go?

10 A It really depends on the specific
11 of, you know, the specific situation. I mean
12 no, I would have to say in answer to your
13 question. There aren't general parameters.

14 Q Do you do an analysis as to
15 whether it was appropriate to rely on the
16 economics of a webcaster that has AQH of 8,000
17 in relation to a webcaster that has AQH four
18 or five times higher than that?

19 A Yes, this is where it's useful to
20 have some knowledge of -- of how webcasting
21 services are provided. If you want to provide
22 additional streams, it's very scalable. You

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1 can get a rack of servers and you can
2 literally put in one server and provide a
3 certain level of services and then if you want
4 to double your capacity, you literally buy a
5 second server, slide it into the rack with an
6 additional hard disk, additional ports and
7 then you've doubled your capacity. If you
8 need to triple it, you had a third one and so
9 forth. So, the -- the basic costs I know are
10 -- are very scalable.

11 There are some actual economies.
12 For instance, you may only have to buy one
13 rack even if you have multiple servers in
14 there.

15 So, as a general rule in this
16 particular industry, it's my judgment that
17 fixed costs would tend to fall somewhat as you
18 get bigger. So, if you were to extrapolate
19 from smaller companies, you would probably
20 over estimate somewhat the fixed costs of a
21 larger company and I believe that's consistent
22 with what the large webcasters have said that

1 they get economies at scale. They get
2 efficiencies, specifically cost efficiencies
3 they have said from their scale of operations.

4 Q Did you in connection with the
5 report that you did provide any analysis in
6 writing first of whether or not the out of
7 size reference points that you used were
8 appropriate for purposes of estimating the
9 cost structure of large webcasters?

10 A Well, if you'd like, we can put
11 the fixed cost tab up here and I can explain
12 how the -- the larger ones relate to the --
13 the smaller ones. I might make very
14 transparent of what -- what --

15 Q Well, I'd like you to answer my
16 question first. Okay. Did you do a written
17 analysis of that nature?

18 A What I did a written analysis
19 described in my report which took the cost
20 from the smaller webcasters and scaled them up
21 to bigger webcasters. That I believe is
22 probably going to leave to an over estimate of

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1 the actual cost. Because the true webcasters
2 will have some economies of scale. Those
3 economies of scale were not accounted for.

4 If you look at the fixed-cost tab,
5 you'll see that my assumption was that the
6 large webcasters had essentially the same
7 costs as the smaller webcasters which is a
8 very conservative assumption.

9 Q Sir, I don't want to look at the
10 final. I want to first find out whether there
11 was an analysis of how you got there.

12 A Yes, what I did was I extended the
13 points.

14 Q Is there a written analysis? I
15 asked is there a written analysis.

16 A The analysis as described in the
17 report is what I did. Is I used the -- and
18 just to be very clear, I used the data points
19 from the webcasters of various sizes and I
20 extended those points out to larger sizes
21 using a regression analysis.

22 Q And we will come back to the

1 subject of a regression analysis in a moment.

2 Let's talk about AccuStream. I
3 believe you said that AccuStream was the
4 source of much of your revenue statistics in
5 your model and the aggregate tuning hours.
6 Correct?

7 A Yes, they were one of the sources.
8 That's correct.

9 Q Well, they were the one you
10 testified was the one whose data you actually
11 used.

12 A For -- for -- well, we were just
13 talking about -- and when you asked me
14 earlier, yes. That's correct.

15 Q On cost bandwidth.

16 A Um-hum.

17 Q But, on revenues, isn't it true,
18 sir, that the revenue assumptions you used --
19 when you say you looked at a number of other
20 sources, the actual revenue information upon
21 which you premised your models was from
22 AccuStream?

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1 A No, that's not correct.

2 Q Well, let's do it again. I'm
3 pretty sure you testified that you may have
4 looked at other sources, but the actual
5 numbers that you used as source materials for
6 the numbers on your models was AccuStream.

7 MR. SMITH: Your Honor, the
8 question was never asked before. He just
9 answered him.

10 CHIEF JUDGE SLEDGE: That is
11 correct. Objection sustained.

12 THE WITNESS: Well, for instance,
13 a big part of the revenue --

14 CHIEF JUDGE SLEDGE: Objection was
15 sustained.

16 THE WITNESS: Okay. Sorry. All
17 right. Thank you.

18 BY MR. STEINTHAL:

19 Q Let me rephrase the question.
20 What specific sources did you rely upon for
21 the numbers that you used -- the revenue
22 numbers you used in your models and I believe

1 in your direct testimony you referred to
2 AccuStream and you referred to certain rate
3 card information that you received from
4 certain websites. Correct?

5 A Well, there are a lot of different
6 sources of revenue and they have a lot of
7 different -- a lot of types of revenue. They
8 have a lot of different sources. For
9 instance, in the -- for the subscriptions
10 which is a very significant part of the model,
11 AccuStream wasn't used at all. We had data on
12 what people are charging for the
13 subscriptions. It's public data. You can go
14 to a website and see. We had estimates from
15 Live365 and others as to what the hour were.
16 That gave us the revenue per hour and
17 AccuStream wasn't involve in all of that.

18 For the advertising, there are a
19 number of different sources for advertising.
20 One of which I used in the report was for
21 radio spots which was from AccuStream.

22 Q Are you done?

1 A Yes, I am.

2 Q Okay. It's correct, is it not,
3 that you relied on AccuStream for your in-
4 stream radio statistics concerning CPM and
5 sell-out rate. Correct? On page 25.

6 A Those are the numbers that I used
7 in my table. That's correct.

8 Q Okay. And also the number per
9 hour of in-stream radio spots you relied on
10 AccuStream?

11 A That's correct. I used AccuStream
12 for the -- some -- the -- the CPM, the sell-
13 out rate and the inventory. Those were the
14 numbers that I put into the table.

15 Q And you relied on AccuStream for
16 video gateway advertising information as to
17 both the sell-out rate and the CPM. Correct?

18 A Those are the numbers that I
19 included in there. That's correct.

20 Q By in there, you mean in your
21 model in your chart?

22 A In the -- in the chart. That's

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1 correct.

2 Q And in terms of the 20 percent
3 commission that you applied for the ad
4 revenues associated with your modeling, you
5 used that because it was consistent with
6 AccuStream. Correct?

7 A It was consistent with AccuStream.
8 It was consistent with my own experience. It
9 was consistent with what the performing rights
10 organization. I believe they actually allow
11 or assume a 15 percent commission rate. I
12 imagine that different ad agencies are free to
13 charge different rates that may be more or
14 less than that, but that's -- that's the right
15 ballpark.

16 Q And your report says you used it
17 because it was consistent with AccuStream.
18 Right?

19 A Yes, it -- it was consistent with
20 AccuStream

21 Q And you used AccuStream for that
22 big schedule of the scale of listener hours on

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1 page 13. Right?

2 A Yes, that's correct.

3 Q And as you said before, you used
4 AccuStream with respect to your bandwidth cost
5 calculations. Right?

6 A In each of those cases, those are
7 the numbers that I included, but in each case
8 if you look at the report, I refer to other
9 examples for that data generally with data
10 that the AccuStream is the more conservative
11 one. Just to give you one example for in-
12 steam audio advertising, we also had data from
13 Live365 which had a somewhat lower CPM than
14 AccuStream with a higher number of ads per
15 hour. It netted out that the Live365 data led
16 to a higher -- higher revenue per listener
17 hour. So, of the one -- given the choice, we
18 chose the one that led to the lower revenue
19 for listener hour in an attempt to be
20 conservative.

21 But, my decisions were based on
22 looking up a number of sources in -- in -- in

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1 each case. AccuStream was a -- a third-party
2 source that I -- I -- I could point to and
3 that from all evidence was conservative.

4 Q Now, I appreciate all that stuff
5 about Live365. The reality is you're quite
6 aware, are you not, that the website
7 information as to the rate card for Live365
8 does not comport with the reality of what
9 advertisers pay. Isn't that right?

10 A Do you want me to talk about what
11 we learned on discovery?

12 Q No.

13 A Be happy to do that.

14 Q I'm asking a question. As you sit
15 here today, is it not an accurate statement
16 that you are aware that rate card information
17 generally speaking is not equivalent to what
18 advertisers actually pay for ads?

19 A What I know as I sit here today is
20 that upon discovery the actual revenue rate
21 calculate for large webcasters was higher than
22 what we calculated. The rate card information

1 as I've noted in my testimony, it's not in
2 this chart, you have to combine the rate they
3 charge with the inventory that they have and
4 the sell-through rate and you have to consider
5 all three of those factors. If you pick out
6 one in isolation, that doesn't give you a
7 meaningful number.

8 What's important I think for us
9 all -- the -- the bottom line is how much
10 revenue companies earn per hour. That's what
11 we're trying to get at. We're not trying to -
12 - that's what matters for the purposes of my
13 model and the bottom line is that I can name
14 specific companies, I guess I'm not suppose to
15 do that right now, that have specific levels
16 of advertising revenue that are greater than
17 what I reported in 2005 and furthermore, we
18 learned in discovery that they are selling ads
19 at a much faster rate now -- faster rate in
20 the fourth quarter of 2005 than I projected
21 and up through the beginning of 2006 were a
22 dramatically faster rate than previously.

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1 MR. STEINTHAL: Your Honor, I
2 respectfully move to strike this. It has
3 nothing to do with the question I asked.

4 CHIEF JUDGE SLEDGE: The motion is
5 denied.

6 BY MR. STEINTHAL:

7 Q Could you answer my question, sir?
8 Is it or is it not true to your knowledge that
9 the quoted rate cards for CPMs are generally
10 not used and that advertisers generally pay
11 less than the quoted rate card?

12 A Yes.

13 Q And indeed, in your report on page
14 23, you said quote under 3.4.2.3 "I have
15 reviewed published rate cards of webcasters,
16 but have, in general, not used them as a basis
17 for my analysis." Right?

18 A Yes, that's what I said.

19 Q And at your deposition, you
20 acknowledged, did you not, that Live365, based
21 on your information, generally received
22 approximately half of what its rate card was?

1 A I don't recall those details.

2 Q Well, let's take a look at page
3 192 from your deposition.

4 MR. STEINTHAL: Your Honors, I
5 believe you have the deposition still up here
6 from yesterday.

7 THE WITNESS: I should -- I have
8 to go to the bathroom. Can we take a short
9 break? I'm just sort of drinking too much
10 water here.

11 CHIEF JUDGE SLEDGE: Sure. All
12 right. We'll take a five-minute recess.

13 THE WITNESS: Thank you.

14 (Whereupon, at 11:51 a.m. off the
15 record until 11:55 a.m.)

16 BY MR. STEINTHAL:

17 Q Professor, my question to you is
18 whether you had recalled testifying that the
19 actual CPMs that Live365 sells as at or
20 roughly half of their published rate card, and
21 you said you didn't remember. So I was going
22 to bring you back to the deposition.

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1 Look at page 194 of your
2 deposition, starting on line 17, a question
3 that Mr. Joseph asked you was as follows:
4 "Before you said because there are a lot of,
5 to again paraphrase in the approximate, you
6 described different strategies that might be
7 used that make it difficult for you to say
8 precisely how the rates actually being
9 obtained relate to the rates on the rate card.

10 So what I'm asking you is to drop
11 precisely and ask whether you are capable as
12 an expert in the field of telling us
13 approximately how the rates actually obtained
14 in the market place by a large webcaster
15 relate to the rates set forth on the rate card
16 as a percentage of the rate set forth on the
17 rate card."

18 And you answered: "So in the case
19 of Live365 it appears that they offered an
20 effective CPM for about half the published
21 rate card, specifically an effective CPM of
22 about 156 per banner versus the three

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1 dollars." And then you on to say, "But they
2 have a higher sell-through rate." So that
3 would be an example of that kind of trade-off,
4 right?

5 A Yes.

6 Q Okay. So, as to Live365, does
7 that refresh your recollection that in fact
8 they achieve a CPM of roughly half the
9 published rate card?

10 A Well, I think you want to include
11 the entire sentence there, and that's exactly
12 my point, that you could have a lower CPM and
13 a higher sell-through rate and end up earning
14 as much or more revenue.

15 Q And it goes the other way around
16 too, right?

17 A Yes, it does.

18 Q That is, if you're going to have a
19 higher sell through rates, sometimes you get
20 a lower CPM?

21 A Yes, that's correct.

22 Q Okay. Is it your understanding

1 that generally speaking large webcasters
2 achieve CPMs that are significantly lower than
3 the published rate card?

4 A That's quite possible for certain
5 categories of advertising. And as I
6 mentioned, it would -- it's really up to those
7 three variables that I explained yesterday.

8 Q Now, let me ask you some questions
9 about AccuStream since you've acknowledged
10 that they were a source of data for your
11 report.

12 In connection with your initial
13 written report was there more than one
14 AccuStream report upon which you relied?

15 A I believe there are a set of them
16 as described in Appendix -- in the
17 bibliography. is that Appendix B?

18 MR. SMITH: Your Honor, if I might
19 interrupt just to clarify something that seems
20 to have arisen. The binders that we gave you
21 do not include the two AccuStream reports that
22 were in the binders originally because those

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1 are the two documents we had pulled and we're
2 going to file a written motion. So if you're
3 looking for them in there, you're not going to
4 find them. That's all I wanted to --

5 CHIEF JUDGE SLEDGE: They're not
6 part of the record?

7 MR. SMITH: No, Your Honor.

8 BY MR. STEINTHAL:

9 Q The AccuStream reports that you
10 rely on; first of all, they were not attached
11 to your written testimony, correct?

12 A Apparently.

13 Q And what was the date when the
14 reports were prepared, the ones that you
15 relied upon?

16 A Well, if you look in the
17 bibliography, there's a set of four of them
18 from 2005, two in 2005, one in 2004, one in
19 2003.

20 Q Okay. Now, at the time that you
21 did your written report, you know -- strike
22 that. I'll do it currently. You know who the

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1 principals of AccuStream are?

2 A I think his name is Paul Palumba.

3 Q Have you ever met him?

4 A No, I haven't.

5 Q Did he personally create the

6 AccuStream reports upon which you rely?

7 A I don't know.

8 Q In fact, do you know who prepared

9 the AccuStream reports upon which you rely?

10 A The company was AccuStream, run by

11 Paul Palumba. I don't know what research

12 assistance he had or -- or what his

13 organizational structure is, no.

14 Q Do you know what the credentials

15 are of the person or people that created the

16 AccuStream reports?

17 A My understanding is he has a

18 degree in economics and an MBA and has been

19 working in this field for a number of years

20 and produced a large number of reports. There

21 are a lot of testimonials on his website from

22 CEOs and other industry experts who say that

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1 they found his reports reliable and useful,
2 and that's about all I know about his
3 credentials.

4 Q Other than the testimonials on the
5 website, do you know anything about the
6 credentials of the people that actually
7 prepared these reports?

8 A Well, I just mentioned what I
9 knew.

10 Q But how do you know that? How do
11 you know there's a economics background behind
12 the people that wrote these reports?

13 A All right. Let me clarify.
14 That's what he reports his -- his credentials
15 are, but I did not hire a PI or anything to
16 verify that he got that degree.

17 Q And your testimony is that you
18 read that on the website and that's your basis
19 for understanding what the credentials are of
20 the person that owns AccuStream, right?

21 A I don't recall where I -- I read
22 that. I did say I read on the website.

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1 Q And in fact do you know what the
2 specific sources of the data were upon which
3 the AccuStream reports were based on?

4 A My understanding is that he spoke
5 to -- or they spoke to the webcasters and
6 industry -- other information experts. In
7 some cases I -- I believe they relied on
8 third-party sources like Arbitron, but I -- I
9 can't remember all the details of the sources
10 at this point. We can go look at --

11 Q You need to keep your voice up.

12 A I can't remember all the details
13 of the sources at this point. We -- we could
14 -- we could look them up, but my -- my --

15 Q But, I'm just asking for you for
16 your recollection right now.

17 A Yes, that -- that's my
18 recollection.

19 Q Is it your recollection that the
20 report actually states what specific
21 webcasters people at AccuStream actually
22 interviewed, if any?

1 A There are portions of the report
2 -- report where he refers in great detail to
3 each of the webcasters and what's going on at
4 each of the webcasters.

5 Q But it doesn't reveal, does it,
6 whether specific interviews were conducted
7 with representatives of those webcasters?

8 A It doesn't reveal the identities
9 of any people that he may have spoke to that
10 I can recall.

11 Q You may have answered this before;
12 pardon me if I did, you didn't interview
13 anyone at AccuStream, correct?

14 A No, I did not.

15 Q And at the time you did your
16 report you had no data at all from any of the
17 webcasters in this proceeding, right? When
18 you did your initial report.

19 A That's not correct.

20 Q Other than the public website
21 information that you referred to previously?

22 A Well, I looked through boxes and

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1 boxes of information; analyst reports about
2 what the webcasters were doing from various
3 investment banks, newsletters that were
4 produced, their own public statements in the
5 media, rate cards, etcetera.

6 Q But you had no specific webcaster
7 economic information upon which to test the
8 accuracy of the AccuStream data, correct?

9 A Other than what I just mentioned,
10 no, we -- we -- we did, as you know, have an
11 opportunity to test it on discovery and I'd be
12 happy to -- to tell you how things turned out.

13 Q I'd like you to answer my
14 questions. Okay? I want to focus on your
15 initial written report. Okay?

16 A Okay.

17 Q Now, if there were material errors
18 in the AccuStream reports, would that cause
19 you to determine that you should not rely on
20 them?

21 A One of the approaches that I took
22 was to look at multiple different sources and

1 thereby get a overall picture of the -- of the
2 market, and I wouldn't want to have my report
3 be vulnerable to any one particular data
4 source for the -- for the examples we gave.
5 Like, for instance, for streaming audio ads,
6 I already mentioned several other sources that
7 also provide information on that. Certainly,
8 I think it's fair to say I put some weight on
9 the AccuStream information, just as I put
10 weight on these other sources.

11 Q Let me go back and ask my question
12 again.

13 A Okay.

14 Q You found material inaccuracies in
15 a report. Wouldn't that cause you to be
16 suspect about its accuracy?

17 A That would make me want to put
18 less weight on that report as compared to
19 other -- other information, yes, absolutely.

20 MR. STEINTHAL: I'll have you mark
21 as Service's Exhibit 29 one of the AccuStream
22 reports cited in your bibliography. Okay?

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1 Thank you.

2 (Whereupon, the document
3 was marked as Service
4 Exhibit 29 for
5 identification.)

6 BY MR. STEINTHAL:

7 Q Is this an excerpt from one of the
8 AccuStream reports upon which you relied for
9 various information?

10 A It certainly looks like one. I
11 mean, it -- it very much matches what I recall
12 seeing.

13 Q Take a look if you would at page
14 SX6515. That's the Bates Stamp number on the
15 bottom right.

16 A Sixty-five what? Sixty-five what?

17 Q Fifteen.

18 A Fifteen. Got it.

19 Q In connection with the forecast
20 for 2006--

21 A Yes.

22 Q -- you see that the forecasts

1 include gateway ads, up at the top, first
2 line?

3 A My -- it says -- the first line
4 says aggregate tuning hours a month. Is that
5 what you're referring?

6 Q The second line, average number of
7 audio avails listening hour includes gateway
8 ads.

9 A Yes. Okay. Yes.

10 Q And then in the bottom, you see
11 where the footnote, at the very end of the
12 footnote it says number sign equals Internet
13 music radio brands including AOL, Yahoo!,
14 Live364, Radio IO, ChainCast Network and
15 others are now actively selling video preroll
16 ads? Do you see that?

17 A Yes.

18 Q And this is a forecast for
19 Internet radio, correct, not music videos,
20 right?

21 A Yes.

22 Q And you know as a matter of

1 testimony and actually experimenting with the
2 websites that neither AOL nor Yahoo! are
3 actually video selling preroll ads for their
4 Internet radio products, correct?

5 A That's my understanding.

6 Q So AccuStream just got that wrong?

7 A Well, it depends a little bit on
8 how you read this.

9 Q Does it really depend on how you
10 read it? They said they have --

11 A I mean, on interpretation -- I --
12 I don't think it's -- it's very well written.
13 It may -- may well be an error, but it could
14 be that in this list some of them are selling
15 preroll ads. I mean, I think one
16 interpretation of this is that we wanted to
17 know if it wasn't just including the audio
18 ads, but in some cases it included video ads.
19 But -- but --

20 Q But it looks like they got it
21 wrong, on first blush, right?

22 A That may well be. I'm not -- you

1 know.

2 Q Now, did you take any steps to
3 investigate the methodology used by AccuStream
4 to satisfy yourself that it was a reliable
5 methodology?

6 A Not beyond the corroboration that
7 we've already discussed several times.

8 Q When you did your initial report,
9 at that time when you testified under oath
10 about your model, had you taken any steps to
11 investigate the methodology used by AccuStream
12 to satisfy yourself that it was a reliable
13 methodology?

14 A I consider it in the context of
15 the other information I had from I that --
16 that I've listed and found that by and large
17 it was reliable. It was the publicly
18 available data we had at the time. I did try
19 to be conservative. So when I had choices, as
20 I already mentioned, I -- I -- the AccuStream
21 actually ended up having less revenue per
22 listener hour than the other sources I saw.

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1 So I -- I did use that one, but as -- as I'm
2 happy to discuss, now that we have the actual
3 data, we see that the revenue per listening
4 hour was higher than what I -- I reported
5 there and I don't know why we were not
6 discussing that, but --

7 Q I'm going to ask you the question
8 again and ask you to answer it.

9 A Yes.

10 Q At the time you wrote your written
11 report, did you take any steps prior to that
12 point to investigate the methodology used by
13 AccuStream to satisfy yourself that it was a
14 reliable methodology?

15 A Yes. The steps that I took were I
16 compared it to other sources and I -- in -- in
17 general it was internally consistent and so I
18 found that I could -- that it seemed to be
19 something that was worth putting some weight
20 on. But beyond that, I didn't investigate
21 their methodology.

22 Q Take a look, if you will, at page

1 196 of your deposition, starting on line 6.
2 Do you recall giving this testimony at your
3 deposition? Mr. Joseph asked you, "Do you
4 know what methodology AccuStream used to
5 develop reports of advertising and revenue
6 data for large webcasters?" Answer: "I don't
7 recall the details, no." "Do you recall
8 generally?" "My understanding is that they
9 talk to industry executives and gather
10 information from people who advertise and
11 webcasters and compile that information."
12 Question: "Do you know what types of industry
13 executives they talk to?" Answer: "Webcasters
14 and people who advertise." And question: "Did
15 you take any steps to assess whether this
16 methodology used by AccuStream is a reliable
17 methodology?" Answer: "There was one source
18 of data that I used for this information and
19 so I also consider the other analyst reports,
20 my own experiences on the websites, the rate
21 cards and discussions with my research team to
22 corroborate those numbers." Question: "Apart

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1 from corroboration from the sources you have
2 just identified, did you take any steps to
3 investigate the methodology used by AccuStream
4 and satisfy yourself that it was a reliable
5 methodology?" Answer: "I found that the
6 information that they provided was consistent
7 with information I got from other sources and
8 that made me feel more comfortable with the
9 reliability of those numbers, although I
10 wouldn't want to rely entirely on any one
11 source." Question: "In response to my first
12 question, you said I believe, Dr.
13 Brynjolfsson, that you relied on other
14 information to corroborate. I then asked you
15 whether apart from corroboration you undertook
16 any steps to investigate the methodology used
17 by AccuStream, and I believe your second
18 response was you found that their information
19 was consistent with the information from other
20 sources. Do you understand corroboration to
21 mean something different than the information
22 being consistent with other sources?" Answer:

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1 "Not really." Question: "Okay. So then let
2 me start again -- let me ask again. Apart
3 from corroboration, did you take any steps to
4 investigate the methodology used by AccuStream
5 and satisfy yourself that it was a reliable
6 methodology?" Answer: "Not that I recall at
7 this time."

8 Was that an honest answer at the
9 time you gave it?

10 MR. SMITH: Objection, Your Honor.
11 Every bit of testimony that he just read is
12 entirely consistent with what he just said
13 here and it is improper impeachment to use
14 consistent prior testimony in that manner.

15 MR. STEINTHAL: With all due
16 respect, Your Honor, the last answer, in my
17 judgment, was never given, notwithstanding how
18 many times I tried to ask the question today.

19 CHIEF JUDGE SLEDGE: Objection
20 sustained. Your understanding is very
21 different than the Court's.

22 MR. STEINTHAL: Your Honor, at

1 this point I'd like to move to strike certain
2 aspects of the direct testimony of the
3 witness. In particular, it has become clear
4 from the direct testimony and the cross
5 examination that two specific items of proof,
6 of reliance, that this witness claims to have
7 made for his models were not part of his
8 direct testimony and that his direct testimony
9 insofar as it relies virtually -- I can't
10 exclusively, but primarily on, for example,
11 the AccuStream reports and on the elaboration
12 that the witness did from the Ting and Wildman
13 report. Both of those analyses and reports
14 are not part of the direct testimony and not
15 in evidence.

16 And if I can read, Your Honor,
17 from the governing regulations on this
18 subject, Section 37 C.F.R. 351.4(b)(1)
19 provides that the written direct statements
20 shall include all the testimony, along with
21 all the exhibits to be presented in the direct
22 statement. That's a quote.

1 The rules also say that the
2 evidence containing the detailed data must be
3 presented as exhibits.

4 In addition, under 37 C.F.R.
5 351.10(e), it is provided that, "If studies or
6 analyses are offered in evidence, they shall
7 state clearly the study plan, all relevant
8 assumptions, the techniques of data collection
9 and the techniques of estimation and testing."

10 In terms of timing, Your Honor,
11 the rules are clear at 351.10(a) and 351.10(f)
12 that "parties are entitled to raise the
13 objections to evidence on any proper ground
14 during the course of the hearing, including an
15 objection that an opposing party has not
16 furnished unprivileged underlying documents."

17 Taken together, Your Honor, the
18 fact that SoundExchange has proffered this
19 witness to support a model principally in
20 reliance on the AccuStream report which is
21 totally without foundation and about which the
22 witness has just answered questions as to the

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1 lack of any independent verification of its
2 accuracy.

3 And in addition, focusing on the
4 cost part of his model one, in particular
5 you'll recall that the witness testified that
6 he had relied on the Ting and Wildman report
7 to a certain point, but then had done a
8 regression analysis based on that Ting and
9 Wildman report, which again, Your Honor, is
10 not part of the direct testimony, has never
11 even been provided to us.

12 So under these rules, the failure
13 of SoundExchange to provide us and the Board
14 with the AccuStream reports or with the
15 regression analysis undermines any ability to
16 put forward an opinion that is premised on
17 those critical exhibits. And I would urge the
18 Board to consider the lack of foundation in
19 particular for both the regression analysis
20 without having the regression analysis before
21 us. What we're being asked to do is accept
22 into evidence opinion testimony about costs

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1 which concededly are based on a regression
2 analysis taking Ting and Wildman with all of
3 its warts applicable to a different universe
4 of webcasters than this one and then a
5 regression analysis to get to the cost that
6 uses in his model, the fact that that
7 regression analysis was not provided to the
8 Board, was not made a part of his direct
9 testimony, makes reliance on the ultimate
10 results insupportable and therefore it should
11 be stricken. That portion of the report that
12 relates to the regression analysis and
13 everything that flows from it, including model
14 one, which is based on that ought to be
15 stricken and the AccuStream data, given that
16 it is by recognition, the biggest source; not
17 the only source, but the biggest source from
18 which the numbers were pulled to plug into his
19 model, it is now clear, number one, that the
20 AccuStream reports are not part of the record
21 before you and therefore on that basis alone
22 his opinion should be stricken, but in

1 addition, given the foundational problems with
2 relying on that AccuStream report or those
3 AccuStream reports that we've just exposed, I
4 would submit that the witness' opinion
5 testimony based on both the regression
6 analysis and the AccuStream reports should be
7 stricken.

8 CHIEF JUDGE SLEDGE: You said that
9 the Ting and Wildman reports and the four
10 AccuStream reports have never been provided to
11 you?

12 MR. STEINTHAL: No, the regression
13 analysis has never been provided to us, Your
14 Honor. None of those documents --

15 CHIEF JUDGE SLEDGE: That's
16 different than what I heard you just say.

17 MR. STEINTHAL: No.

18 CHIEF JUDGE SLEDGE: You did not
19 say that you've never been provided the Ting
20 and Wildman reports and the four AccuStream
21 reports?

22 MR. STEINTHAL: That is correct.

1 I don't want to have a double negative. It is
2 correct that we have been provided with those
3 reports. They have not been provided to Your
4 Honors. They have not been provided as part
5 of the direct case. They were not attached to
6 the testimony of the witness and as I read
7 from the rules, Your Honor, it is required
8 that those reports be part of the evidence in
9 order for there to be something like this
10 opinion that flows from it that was built upon
11 clearly those materials which have not been
12 made part of the direct case. In particular,
13 the AccuStream materials, we have the
14 additional situation, even, Your Honor, had
15 they been made part of the record, we would
16 move to strike so much of this witness'
17 testimony that is based on those reports given
18 the lack of any foundation for the reliability
19 of those reports and the lack of the witness'
20 having done any independent verification of
21 the data contained in those reports.

22 CHIEF JUDGE SLEDGE: In your

1 citations to the regulations, did you cite
2 anything as to the form of a motion to strike?

3 MR. STEINTHAL: Your Honor, it
4 says the parties are entitled to raise the
5 objections to evidence on any proper ground
6 during the course of the hearing. That's in
7 37 C.F.R. 351.10(f).

8 CHIEF JUDGE SLEDGE: Are there any
9 regulations that direct the form of a motion
10 to strike?

11 MR. STEINTHAL: Not to my
12 knowledge, Your Honor.

13 JUDGE WISNIEWSKI: Mr. Steintal?

14 MR. STEINTHAL: Yes?

15 JUDGE WISNIEWSKI: A point of
16 clarification. You said that you received the
17 documents that you referred to, the AccuStream
18 documents and the Ting and Wildman study in
19 response to your discovery request, is that
20 correct?

21 MR. STEINTHAL: Yes.

22 JUDGE WISNIEWSKI: With respect to

1 the Ting and Wildman study, did that also
2 embrace Appendix 3 of that document?

3 MR. STEINTHAL: In discovery, yes.

4 JUDGE WISNIEWSKI: Okay. Thank
5 you.

6 MR. STEINTHAL: Now, I would
7 state, Your Honors, that I've limited the
8 motion to that which we've already examined
9 the witness on. We haven't gotten to the
10 projections from 2006 to 2010, which in large
11 measure are based on the AccuStream data as
12 well. But I wanted -- now that we've
13 concluded our examination about the materials
14 that appear to be lynch pins of the model and
15 the defects both under the rules and the
16 foundational problems with the AccuStream data
17 in particular, we felt it appropriate to make
18 the motion at this point in time.

19 CHIEF JUDGE SLEDGE: And you're
20 only referring to the testimony in model one?

21 MR. STEINTHAL: Your Honor, I
22 think the motion is really that any of his

1 testimony --

2 CHIEF JUDGE SLEDGE: I can't deal
3 with that.

4 MR. STEINTHAL: Okay.

5 CHIEF JUDGE SLEDGE: You're going
6 to have to be specific.

7 MR. STEINTHAL: Then model one in
8 particular and model two insofar as the
9 projections are based on AccuStream data, we
10 would move to strike so much of his testimony
11 that is based on the AccuStream data on the
12 same basis. And there are various charts that
13 were proposed. Again, I would note that some
14 of the demonstrative don't come into evidence,
15 but the charts in his direct statement that
16 are based on the advertising projections
17 flowing from the AccuStream report, Your
18 Honor, we would move to strike those as well.
19 Again, it's
20 the --

21 CHIEF JUDGE SLEDGE: Assuming we
22 accept an oral motion, we certainly will not

1 consider undefined various charts.

2 MR. STEINTHAL: Fair enough. Your
3 Honor, it would be, in reference to the table
4 on page 11 of the written direct statement, as
5 well as Tables 1, 3, 6, 8 and 10, all of which
6 relate quite specifically to data points drawn
7 from the AccuStream.

8 CHIEF JUDGE SLEDGE: Please repeat
9 that.

10 MR. STEINTHAL: Yes. The table on
11 page 11 of the written direct at --

12 CHIEF JUDGE SLEDGE: What table
13 number?

14 MR. STEINTHAL: It doesn't have a
15 number, Your Honor. It's a chart. And then
16 Tables 1, 3, 6, 8 and 10, all of which are
17 based largely upon data drawn from the
18 AccuStream reports.

19 CHIEF JUDGE SLEDGE: Any other
20 questions?

21 (No audible response.)

22 MR. STEINTHAL: And the regression

1 analysis from Ting and Wildman, just to
2 complete the sentence.

3 CHIEF JUDGE SLEDGE: Where is
4 that?

5 MR. STEINTHAL: That's part of
6 Table 1, Your Honor. It's on Table 6. In
7 other words, the regression analysis which
8 we've never seen which is referred to by the
9 witness as how he got from Ting and Wildman --

10 CHIEF JUDGE SLEDGE: You said
11 Table 1?

12 MR. STEINTHAL: Right, and model 1
13 is on Table 6, and that's where that is as
14 well.

15 CHIEF JUDGE SLEDGE: You said
16 Table 6.

17 MR. STEINTHAL: We're covered.
18 Those are the ones that we feel should be
19 stricken and the surrounding testimony.

20 CHIEF JUDGE SLEDGE: Any other
21 presentations to be made in support of the
22 motion to strike by DiMA?

1 (No audible response.)

2 MR. JOSEPH: Your Honor, Bruce
3 Joseph of Broadcasters. We would join in the
4 motion to strike. We would call Your Honors'
5 attention to the advertising tab in Appendix
6 A, which actually goes through in great detail
7 the specific sources of information from the
8 witness and the witness of course testified
9 that he was very careful to cite the sources
10 he relied upon. If you look at that
11 advertising tab, there are notes identifying
12 the sources for each line. And if you would
13 consider the radio spots portion, which by the
14 way comprises the majority of the revenue in
15 every year except 2005 where it's 42 percent
16 of the revenue he attributes and you will see
17 in line 2 the source AccuStream. He then also
18 refers to the rate cards, but he said in his
19 testimony that he didn't rely on rate cards.
20 On line 3, the tables for 2005 and 2006 come
21 from AccuStream and that's one of the exhibits
22 that was not put into evidence, SX2005DP. On

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1 line 4, figures for 2005 and 2006 come from
2 AccuStream. Those are the only sources cited.
3 Line 5, he multiples AccuStream times
4 AccuStream times AccuStream and divides by
5 1,000. So it's again entirely AccuStream.

6 If you look at the video gateway
7 ads portion, lines 12, 13, 14, 15 and 16,
8 again, line 13 in the report, he cites
9 AccuStream, but says in interviews with
10 AccuStream he got other information. So again
11 the source is entirely AccuStream. Line 15 he
12 refers to AccuStream. Line 16, the model uses
13 AccuStream sell out rate for 2005 and then he
14 moves from there. So again, it's mostly all
15 AccuStream for that particular piece of the
16 puzzle. But this is a convenient location to
17 actually see the extent of the reliance on the
18 AccuStream data.

19 It should also be noted that that
20 AccuStream data was published in August 2005,
21 meaning that the 2005 and 2006 numbers are
22 themselves projections and the witness gave no

1 testimony or indication that he did anything
2 to investigate the means that AccuStream used
3 to make those projections. Thank you, Your
4 Honor.

5 MS. BROWN: Your Honor, Kris Brown
6 on behalf of NPR. We join in the motion as
7 well.

8 JUDGE ROBERTS: Mr. Brynjolfsson,
9 the question was asked of you with respect to
10 the regression analysis that's being discussed
11 --

12 THE WITNESS: Yes.

13 JUDGE ROBERTS: -- with Ting and
14 Wildman, whether there was any physical
15 document where you had made your calculations
16 and was answer to that no, there is no
17 physical document, that you had used a
18 computer program, I believe, to make those
19 calculations?

20 THE WITNESS: Yes, it was actually
21 a very trivial calculation, but that's
22 correct, it was in a -- a spreadsheet, which

1 I thought we had provided to them, but if you
2 actually look at the numbers, you'd see it's
3 just a trivial linear extrapolation.

4 JUDGE ROBERTS: But there is a
5 document that exists?

6 THE WITNESS: Yes, there is.

7 CHIEF JUDGE SLEDGE: Mr. Smith?

8 MR. SMITH: Your Honor, there's a
9 whole variety of arguments that were
10 interwoven there, so I'll try to sort them
11 out, if I could.

12 First, with regard to the printed
13 materials on which Dr. Brynjolfsson relied,
14 all of which are cited carefully in his
15 report. Mr. Steinthal referred to some
16 nonexistent requirement that every document
17 that you rely on as a expert witness be
18 attached to your written direct testimony.
19 There is no such provision in the rules that
20 I can find. The reality is that the rules say
21 you should attach documents that would be
22 exhibits at trial that you choose to make your

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1 exhibits; we have done that. We then provided
2 everything that he cited in discovery,
3 including the AccuStream reports, including
4 Ting and Wildman, including the appendix.
5 They've had them. They in fact put some of
6 them back in the record here at trial as their
7 own exhibits. So there is no conceivable
8 prejudice to them from not having gotten these
9 materials, because they got these materials
10 and there is no requirement that you take
11 every single thing that you refer to in your
12 report and attach it to it. It's just not in
13 the rules. It would be silly rule if it was.
14 Experts frequently say here's where I got the
15 information, cite that and then you provide it
16 to them in discovery. That's what the system
17 is designed to do. The discovery process is
18 to provide the documents that underlay the
19 testimony and that's what we did.

20 With regard to the regression,
21 which was discussed in some detail in the
22 motions to compel and in our March 15th motion

1 to -- response to the DiMA motion to compel,
2 SoundExchange stated in detail exactly how the
3 regression was done, that it was; I'll quote
4 it, "SoundExchange responds as follows: 'Dr.
5 Brynjolfsson used a standard formula in
6 Microsoft Excel, the forecast function. He
7 calculated the cost for stations with average
8 quarter hour AQH values beyond 20,000 AQH by
9 inputting a desired AQH value in Ting and
10 Wildman's data. In Excel, the forecast
11 function can be accessed by going to the
12 insert menu, selecting function and typing
13 forecast in the search box.'"

14 So we addressed this issue at the
15 time of the motion to compel. We gave that
16 information in our brief. There's been no
17 subsequent complaint from them or direction
18 from this Board that we needed to provide any
19 additional information about that regression.
20 And so I don't know why it would suddenly be
21 brought up at trial like this.

22 The second argument seems to be

1 that somehow they think that the cross
2 examination this morning has laid a basis for
3 disqualifying the testimony because they think
4 they've impeached AccuStream and Ting and
5 Wildman as sources on which this expert could
6 rely, along with a lot of other corroborating
7 information. We've all been sitting here this
8 morning; the idea that they have elicited
9 testimony that would suggest that, to me, just
10 seems fanciful. There is no testimony that
11 they've gotten from this witness that would
12 suggest it was unreasonable of him to take
13 these publicly published sources, the best
14 sources he had available at the time, put
15 together a report, knowing that the way the
16 process was designed is you do your expert
17 analysis first, then you get the data from the
18 other side and then you can amend it to take
19 into account what you've subsequently learned.
20 That's the process that Congress in its wisdom
21 set up. So that's what he did. He used the
22 best available data, knowing that he could

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1 amend it and change it, if necessary. And as
2 he's testified, the reality is, he got the
3 inside data that was presumably more reliable
4 than the newsletter and the AccuStream
5 reports, it ended up producing the same
6 results, or in fact results suggesting that he
7 had been conservative.

8 Now, given that undisputed record,
9 the idea that this gentleman's testimony would
10 be excluded on the basis of being unreliable,
11 I just can't even imagine what the basis of
12 that would be, Your Honor. The system was
13 designed for people to do exactly what this
14 witness did and there is no basis, either in
15 terms of document production or in terms of
16 the reliability of what he relied on at the
17 various stages of his work that would suggest
18 that there's anything that ought to be
19 stricken from this record.

20 JUDGE ROBERTS: Mr. Brynjolfsson
21 testified, Mr. Smith, that he did create a
22 document in that regression analysis and I

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1 recall quite clearly that response that you
2 read to us, that this is the formula to
3 calculate these numbers and you provided that
4 to the other side. Why didn't you produce the
5 document that he is referring to apparently
6 exists?

7 MR. SMITH: If there is such a
8 document that we had in our possession,
9 obviously we would have given it, Your Honor.
10 I was not personally involved in this and I'll
11 have to try to check over lunch to see whether
12 or not there was a document or whether in fact
13 this was just done on a computer, which would
14 be the ordinary way it would be done.

15 THE WITNESS: I was referring to
16 an electronic document as opposed to a paper
17 one.

18 JUDGE ROGERS: Okay. But the
19 impression that I got from your response in
20 discovery was if you -- it appears how the
21 calculation was made, just use this program
22 and type in the number and it will give you

1 the regression analysis.

2 Did you just do this and then that
3 electronic document was then deleted, or
4 eliminated, or was never saved? Or does it in
5 fact exist?

6 THE WITNESS: I imagine a copy of
7 that spreadsheet exists somewhere. I haven't
8 looked at -- at that since October, so it may
9 have been deleted. It was such a trivial
10 calculation that was not very material to the
11 analysis that I -- I -- I haven't kept track
12 of it.

13 CHIEF JUDGE SLEDGE: Mr. Smith,
14 any follow-up on that?

15 MR. SMITH: Your Honor, obviously
16 to the extent that there was a document that
17 we had, we would have given it to them. I was
18 not personally involved in that issue. I may
19 have more information for you after lunch, if
20 you want us to find out more about exactly
21 what happened with that document, if there was
22 one.

1 MR. STEINTHAL: If I may briefly,
2 Your Honor, on the subject of the regression
3 analysis, obviously there are a range of
4 numbers that one might plug into such an
5 analysis. And without the benefit of knowing
6 what those numbers are, we don't believe that
7 the Board has a basis for taking in a model
8 that's based on such a regression analysis,
9 and we certainly don't know because we've had
10 no basis upon which to cross examine the
11 witnesses to how that regression analysis was
12 conducted in terms of what numbers were
13 plugged in.

14 So, under the rules, under the
15 principles of fairness, as well as
16 longstanding evidentiary rules, to the extent
17 the Federal Rules of Evidence might be used as
18 a guide, we do not believe there is a basis
19 absent knowledge of and the evidentiary
20 support for the regression analysis that he
21 did to support model one, which is based
22 explicitly on a regression analysis, Ting and

1 Wildman's costs being taken forward to
2 different size webcasters based on that
3 regression analysis.

4 That's that issue.

5 With respect to the motion as it
6 pertains to the AccuStream data and in
7 particular the opinions and the models based
8 on the AccuStream data, again, Your Honor, we
9 refer by analogy of the Federal Rules of
10 Evidence, Rule 703, that clearly requires that
11 in order for facts to be taken in from an
12 expert, it has to be "of the type reasonably
13 relied upon by experts in the particular
14 field." And we would submit to you that there
15 is simply no foundation that has been laid by
16 SoundExchange that these AccuStream reports
17 are "of the type reasonably relied upon by
18 experts in the particular field."

19 We noticed in the direct testimony
20 yesterday that there was no effort made to
21 support where these documents came from, what
22 kind of analysis, what kind of investigation

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1 underlay those reports. The witness just got
2 them on the Internet. He got them from
3 sources without even once consulting with the
4 author as to how those reports were
5 constructed, what webcasters formed the basis
6 of those analyses and he constructs an entire
7 model which could affect our webcasters for
8 years to come based on documents that we
9 haven't the foggiest idea where the underlying
10 data came from. We do not believe, Your
11 Honor, that that sort of documentation is "of
12 the type reasonably relied upon by experts in
13 the particular field."

14 And when the particular
15 regulations for the Board state that the
16 written direct statement shall include all
17 testimony along with all the exhibits to be
18 presented in the direct statement, that's not
19 a trivial issue. It's one to make sure that
20 the evidentiary record before you includes a
21 basis upon which you can formulate questions
22 too about what underlies an expert's report.

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1 And when the rules governing the proceeding
2 state if studies or analyses are offered in
3 evidence, they shall state clearly the study
4 plan, all relevant assumptions, the techniques
5 of data collection and the techniques of
6 estimation and testing, we submit to Your
7 Honor that on the regression analysis, plainly
8 the failure to provide that is a violation of
9 that rule and in terms of the AccuStream data
10 insofar as that has been used for purposes of
11 extrapolating to model two and the tables that
12 we've moved against, we would submit to Your
13 Honor that we have not, and you have not, been
14 given the kind of evidentiary support that CFR
15 351.10(e) would require.

16 I don't know, Bruce, if you have
17 anything else to add?

18 MR. JOHNSON: Very little. I
19 haven't been recognized by the Court.

20 CHIEF JUDGE SLEDGE: Mr.
21 Steinthal, you're not in charge --

22 MR. STEINTHAL: I'm sorry.

1 CHIEF JUDGE SLEDGE: -- over this
2 hearing, not standing your -- that might be a
3 desirable thing.

4 MR. STEINTHAL: I apologize, Your
5 Honor. I just wanted to let him know I was
6 done.

7 CHIEF JUDGE SLEDGE: All right.
8 Mr. Joseph, anything to add?

9 MR. JOSEPH: Yes, Your Honor. I
10 think the lack of foundation is clear. An
11 expert in the field would not rely on a report
12 with no idea of how the data were collected,
13 from what sources, how the data were weighted;
14 there are many different webcasters, how
15 projections were made. And I think the
16 regulation Mr. Steinthal cited; and again I'm
17 only speaking of the AccuStream reports here,
18 the 351.10(e), there's a reason that if
19 analyses or studies are to be offered into
20 evidence they shall clearly state the study
21 plan, all relevant assumptions, the techniques
22 of data collection and the techniques of

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1 estimation and testing. And that's so that
2 the Board and opposing parties have an
3 opportunity to determine what those
4 assumptions were, what the techniques were and
5 what the techniques of estimating and
6 estimation in testing were and you shouldn't
7 be able to circumvent that rule by simply
8 going to a second source and not inquiring
9 what those methodologies were when you're
10 through an expert. That's all I've got.

11 CHIEF JUDGE SLEDGE: Ms. Brown?

12 MS. BROWN: Only one thing, Your
13 Honor, and that is the AccuStream reports
14 themselves also don't set forth the
15 methodologies or the governing assumptions, so
16 we would submit that is also a failure and
17 violation of 310(e).

18 CHIEF JUDGE SLEDGE: Is your
19 understanding that 703 permits this type of
20 challenge to an expert during the testimony of
21 a trial as opposed to being a preliminary
22 matter raised in advance of that point?

1 MS. BROWN: It's my understanding
2 that by analogy through these rules, Your
3 Honor, it would be allowed since the rules
4 themselves, for this proceeding, clearly
5 contemplate that this objection can be raised
6 during the hearing.

7 CHIEF JUDGE SLEDGE: Mr. Smith,
8 any final comments?

9 MR. SMITH: Yes, Your Honor.
10 They've been on notice since we gave them the
11 most thorough testimony that's been filed in
12 this matter six months ago about exactly what
13 kind of study it was and that he used
14 publicly-available third-party sources for the
15 data in the initial phase of his study. So
16 there is no possibility of a lack of notice
17 about that.

18 We now have started to hear in the
19 rebuttal argument about Rule 703 of the
20 Federal Rules which says that in federal
21 courts experts have to give testimony that
22 this is the kind of material that they would

1 rely on in their work. Notice, however, that
2 in the full day of cross examination Mr.
3 Steinthal failed to ask Dr. Brynjolfsson that
4 question. If he thought that was the relevant
5 standard, all he had to do was ask him, "Would
6 you in your work as an economist do a model
7 based on these kinds of data?" And we could
8 all ask him that question and find out the
9 answer, if that standard is going to be
10 imported into these proceedings, which it's
11 not in the rules governing these proceedings,
12 but it certainly might be an appropriate thing
13 to bring into these proceedings. But if it's
14 going to be, we ought to be put on notice and
15 allowed to ask that question of our expert.

16 I add as well that this expert was
17 deposed for a full day in March and any and
18 all of these issues could have been gotten
19 into. On the issue of the regression in
20 particular, it's not there's some mystery
21 about the numbers. The numbers are right in
22 the Ting and Wildman report that Mr. Steinthal

1 put in front of the Court. Those are the
2 numbers he plugged in. That's the testimony
3 of the witness. And then it's a very simple
4 calculation which we reviewed in detail. Now,
5 I'm going to go find out whether there's a
6 piece of paper out there and if there is,
7 there may be something we need to do to give
8 it to them and let them ask questions about
9 it. But aside from that issue, there is
10 absolutely nothing that they have offered to
11 you that is even, in my respectful judgment,
12 even a serious argument for excluding this
13 testimony, particularly when it is all, as the
14 witness has said, been corroborated not just
15 by multiple public sources, but by the
16 evidence that they had in their possession
17 because it's their data and when they supplied
18 it it led to the conclusion that he was right
19 all along. Now, what are we doing here?

20 Thank you, Your Honor.

21 CHIEF JUDGE SLEDGE: All right.
22 We'll recess and return at 2:15.

1 (Whereupon, at 12:49 p.m. off the
2 record until 2:19 p.m.)

3 CHIEF JUDGE SLEDGE: Gentlemen,
4 the lunch break, we have no response to that
5 motion at this time.

6 MR. SMITH: Your Honor, if I might
7 report on the regression analysis issues?

8 CHIEF JUDGE SLEDGE: Yes.

9 MR. SMITH: I have become educated
10 over the lunch break and there is not now and
11 never was a paper docket reflecting that
12 regression analysis.

13 I spoke to Professor Bakos, who is
14 Professor Brynjolfsson's collaborator and is
15 here in the courtroom and he is the one who,
16 in fact, performed that calculation and
17 produced the data that went into Table 1 in
18 the report. He did that by using a
19 spreadsheet that's in Appendix 3 to the Ting
20 & Wildman spreadsheet to the other side in
21 discovery, adding a few numbers, producing a
22 few additional numbers which he then cut and

1 pasted into Table 1. And there was not at
2 that time a preserved that particular
3 spreadsheet where the numbers were cut and
4 pasted from.

5 It's an easy matter to recreate
6 that at anytime, we could do that. But it
7 basically took the numbers that are in Ting
8 and Wildman and then added rows for the
9 different size webcasters and produced what
10 their costs would be and then put those
11 numbers directly into Table 1. And so there
12 is no document, contemporaneous document to
13 produce and there never was one. And so
14 that's what I have to report.

15 CHIEF JUDGE SLEDGE: All right.
16 Mr. Steinthal?

17 MR. STEINTHAL: Just carry on the
18 cross, Your Honor?

19 CHIEF JUDGE SLEDGE: Yes, sir.

20 CROSS EXAMINATION

21 BY MR. STEINTHAL:

22 Q Good afternoon, Professor.

1 A Hi.

2 Q Some very specific questions on
3 your cost analyses and I think some of these
4 are up on your model one.

5 A Yes.

6 Q In terms of cost or they may be
7 components of your cost.

8 You're familiar with the fact that
9 Ting and Wildman have in their report a
10 category of cost for webcasting personnel?

11 A Yes, I am.

12 Q And if you look at Table 1, and I
13 guess I have to show you Table 1, right?

14 A What report are you referring to?

15 Q Your Table 1.

16 A Oh, okay.

17 Q This one right here. Your Table 1
18 has a category of personnel and other
19 miscellaneous costs, is that right?

20 A Yes, that is correct.

21 Q Now is it not true that the
22 \$14,583 number is simply the taking the

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1 personnel cost figure from Ting and Wildman
2 and dividing it by 12?

3 A I believe it is, yes.

4 Q Now your chart says personnel and
5 other miscellaneous costs including encoding,
6 development, programming, G&A.

7 A Yes.

8 Q The Ting and Wildman report just
9 says personnel costs, right?

10 A I'd have to check the report.

11 Q Well, please do.

12 A All right. Well, it appears the
13 details are on Appendix 3, which you haven't
14 provided here, so I don't have those details
15 in front of me.

16 Q Well, you can do it as a matter of
17 math, can't you? You can look at the Appendix
18 and see that the Ting and Wildman category for
19 personnel costs annually divided by 12 equals
20 14,583, right?

21 A Well, the question is what the
22 personnel costs include?

1 Q Right.

2 A My understanding is that they
3 include the costs of personnel for encoding,
4 personnel for development, personnel for
5 programming and personnel for general and
6 administrative. That's what personnel do.

7 Q Well, when I first heard that, I
8 must say, I thought that you included the
9 costs of actually encoding sound recordings
10 and actually out-of-pocket programming costs
11 and GNA.

12 A Okay.

13 Q So are you saying that you had
14 included in the category of personnel and
15 other miscellaneous costs not just costs of
16 personnel, but costs associated with acquiring
17 good that enabled you to do encoding, to do
18 programming, to do development?

19 A Again, I don't have the Appendix 3
20 right in front of me to define it, but my
21 recollection is that programming personnel,
22 development personnel, general administrative

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1 personnel, people who do encoding, those
2 people would be the personnel costs that would
3 be included.

4 Q With all due respect, sir, it says
5 personnel and other miscellaneous costs.
6 Isn't it true that the category that you
7 captured for purposes of that chart was simply
8 personnel costs?

9 A I think you may be misinterpreting
10 the Ting and Wildman report. You see, for
11 instance, by comparison equipment similarly
12 there's one line here that has equipment. I
13 used that sort of as a header. There's a
14 header for personnel. But then in this report
15 here they go on and describe in more detail
16 what equipment includes including these other
17 categories. And for personnel it also
18 includes these other categories.

19 The fact that the header is
20 shorter doesn't mean that the header isn't
21 meant to encompass all of those categories or
22 subcategories, I should say.

1 Q Can you point me to something in
2 the Ting and Wildman report that states that
3 the personnel category includes out-of-pocket
4 costs for encoding, development and
5 programming of a webcasting service?

6 A As I said, it appears to be in the
7 Appendix. But I do know from my personal
8 expertise that when you do webcasting the
9 things that webmasters do are development,
10 programming, general administrative; that's
11 what you hire personnel to do. So it would
12 seem to be consistent with my understanding of
13 what personnel do listed for webcasters.

14 Q But you don't have any information
15 other than what's the Appendix then, right?

16 A Other than my expertise and what
17 is the in the Appendix, no I don't.

18 Q And your testimony is that your
19 expert opinion is that when somebody says I've
20 got personnel costs of X, that X includes the
21 out-of-pocket costs to deal with programming
22 development, R&D, encoding costs of sound

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1 recordings to encode them and put them on your
2 server? Is it your testimony that when
3 somebody says I've got personnel costs of X it
4 includes not only what you pay the personnel
5 but all those additional costs?

6 A The header personnel here, it's my
7 understanding that that header refers to these
8 subcategories, yes.

9 Q Now, again, your chart there says
10 equipment including depreciation amortization,
11 right?

12 A Yes, it does.

13 Q And what you did is you just took
14 the equipment line in Ting and Wildman and
15 divided it by 12 and came up with that 11,250,
16 right?

17 A As I recall they had a high end
18 webcaster and a low end webcaster. I choose
19 the high end -- the more expensive of the two
20 and divided that by 12 to get the monthly
21 costs?

22 Q But to be clear you choose the

1 annual figure under the caption "Equipment" in
2 the Ting and Wildman report?

3 A Yes.

4 Q And when you replicated it on the
5 chart you used the words "Equipment Including
6 Depreciation and Amortization," right?

7 A Again, if you have the Appendix,
8 if I could take a look at it, I would be able
9 to match up the exact subcategories there were
10 included. If that's what you would like me to
11 do.

12 Q Well, in fact, sir, I've got the
13 Appendix in a computer form.

14 A Okay.

15 Q My specific question to you is
16 whether when you presented this chart you made
17 it clear or you were suggesting to the panel
18 that equipment included costs of depreciation
19 amortization?

20 A Well, I think my -- what I
21 presented and what my understanding is that
22 these two categories encompass all of the

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1 relevant fixed costs and group them into major
2 categories; equipment and personnel.

3 Q And I hate to go back, I'm just
4 trying to really understand what you're doing
5 here. It is correct, is it not, that you
6 simply captured all of the costs under the
7 category equipment in the Ting and Wildman
8 report and presented the monthly amount that
9 you drew from that as being equipment
10 including depreciation and amortization,
11 right?

12 A Yes.

13 Q Okay. And you don't have any
14 information about what in fact was included in
15 Ting and Wildman equipment categorization
16 other than what's in the Ting and Wildman
17 report and particularly in the Appendix,
18 right?

19 A I have the information that they
20 provided, and that's consistent with my own
21 understanding of what's required to run
22 webcaster. It's consistent, as we said before

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1 lunch, with the radio and Internet newsletter,
2 several different issues as well. So I use all
3 that information to come to the conclusion
4 that this is a conservative estimate of the
5 fixed costs of running the webcaster.

6 Q That's not really true, is it? I
7 mean, the reality is you took the number --

8 A It is really true.

9 Q No. Let me finish my question.
10 To get that number 11,250 you took a specific
11 number from Ting and Wildman and you put it on
12 the board as being the monthly figure taken
13 from Ting and Wildman, which you're
14 representing is equipment including
15 depreciation and amortization, right?

16 A Yes.

17 Q And you don't know in fact what
18 Ting and Wildman included in their category of
19 equipment other than what Ting and Wildman say
20 in their report about what they put in that
21 category, right?

22 A They include hardware and

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1 networking gear, software which is consistent
2 with my understanding of what it is to be a
3 webcaster. I don't understand your question.
4 That's what they say put in there, that's what
5 I understand is required, that's what it is.

6 Q Where is research and development
7 costs?

8 A Well, development is listed right
9 here. And I'm not sure what you mean by
10 research. I don't know how much research per
11 se a webcaster does. But, I guess you could
12 consider some of the programming to be a kind
13 of research, perhaps.

14 Q You're inferring that?

15 A Yes.

16 Q Now, if I get this right then in
17 2005 and 2006 you have your estimated costs
18 for a large webcaster, right?

19 A Yes, that's correct.

20 Q Now, did you compare the actual
21 costs when you had the opportunity in
22 discovery of some of the larger webcasters

1 against the figures on your chart?

2 A I was unable to find any
3 meaningful numbers in discovery comparable to
4 this. But to see how those numbers are
5 derived that you're referring to, you can see
6 that it as the average quarter hours grow the
7 costs grow roughly proportionately. And that
8 reflects the increased scale of operations.
9 There's no big mystery about how those numbers
10 came about.

11 Q You didn't take a AOL's
12 interrogatory answers to see that their
13 personnel costs for radio alone in 2005 were
14 over \$60,000 a month?

15 A I was not -- it was not by
16 sufficient detail to know what they were
17 including in those personnel costs. So I
18 don't know what kinds of new ventures or ideas
19 they were considering, what kinds of
20 investments for the future they were
21 undertaking. These are the costs that would be
22 required to do -- to maintain ongoing

1 operations. It's my understanding that all
2 the webcasters are engaged in a broad set of
3 initiatives, research as you describe, whether
4 you develop products none of which are
5 essentially for running an operation. And
6 unless we have some way of separating those
7 out, it would be meaningless to include those
8 kinds of research activities for future
9 projects alongside the fixed costs of
10 operating a webcaster.

11 Q So your testimony that AOL did not
12 provide information in an interrogatory about
13 what their personnel costs for radio were or
14 do you just not know one way or the other?

15 A The relative -- I -- I don't know
16 whether those were the relevant fixed costs,
17 the relevant personnel costs for running a
18 webcaster. I don't know what was included in
19 that, you know. AS you mentioned, it could be
20 all sorts of -- it could R&D, it could be
21 lawyers, it could be all sorts of other things
22 that --

1 Q I didn't mention that the AOL's
2 personnel costs could include all those other
3 things. I just asked you a question as to
4 whether you were familiar with the figure
5 provided by AOL in an interrogatory answer as
6 to what their personnel costs for radio were.

7 A I reviewed them and, as I said, I
8 didn't see them as being -- matching up to
9 what we needed to run a webcaster.

10 Q Matching up against whatever it is
11 Ting and Wildman had in their report?

12 A Matching up with what was required
13 to run a webcasting operation because they
14 didn't provide that level of detail. I don't
15 know what those personnel are doing.

16 Q Is it your testimony you looked at
17 the interrogatory answers of AOL?

18 A As best I can recall. I recall
19 reviewing a large amount of materials and
20 looking for evidence on fixed costs and not
21 finding it.

22 I was unable to find any

1 quantitative numbers. I did find references to
2 what happens to fix costs in several places in
3 his deposition and I think in his presentation
4 Bob Roback said that increased scale allowed
5 them to have lower costs and allowed them to
6 get economies of scale. So that --

7 Q I don't believe there's a question
8 pending.

9 A I'm just following up on the
10 question that you asked. And I was thinking of
11 any evidence that I came across that spoke to
12 the question of a fixed costs. And that was
13 the evidence that I could think of.

14 Q Did you look at the evidence
15 produced by Live365 as to what its monthly
16 costs of personnel were?

17 A I believe I did, yes.

18 Q Did you come to the conclusion
19 that they were a lot more than the monthly
20 costs on your typical webcaster, large
21 webcaster?

22 A Again, i don't know what costs

1 were included with that Live365 because it's
2 a somewhat different business model where they
3 provide webcasting services for smaller
4 groups. So, again, it wasn't really an apples-
5 to-apples comparison.

6 Q Well let's go back to AOL now that
7 I have the specific page that I wanted you to
8 look at.

9 A Okay.

10 Q I'm not going to mark this as an
11 exhibit since it's a filing in the case called
12 "Responses and Objections to SoundExchange's
13 First Set of Interrogatories for America
14 Online."

15 I'll ask you to look at Exhibit 3
16 entitled "Radio Operating Forecasts."

17 JUDGE ROBERTS: Page number?

18 MR. STEINTHAL: It's Exhibit 3,
19 Your Honor. And I ask -- the information is
20 restricted. I'm going to try to dance around
21 it to keep the record open.

22 BY MR. STEINTHAL:

1 Q But you see that there is a annual
2 personnel line in Exhibit 3?

3 A No. Where is that? You referring
4 to line labeled "Total Personnel" is that the
5 one you're talking about under General
6 Administrative or I'm not sure where you're
7 referring.

8 Q Yes. Under Radio Operation
9 Forecast it has General and Administrative and
10 then there's a Personnel category, right?

11 A Yes, I see that.

12 Q And do you see what the annual
13 costs? I don't want you to read it into the
14 record. Do you see what the annual costs are
15 for AOL?

16 A Yes, I do.

17 Q Okay. And if you divide that by
18 12 for the AOL radio product, you get to a
19 number that's roughly three times or more the
20 number that you found to be a typical monthly
21 personnel cost for a large webcaster, right?

22 A I'll take your word for it.

1 Q Okay. Now when you talk about all
2 the evidence that was corroborative of your
3 model that you got on discover you didn't
4 mention, right?

5 A I didn't think it was a useful
6 benchmark.

7 CHIEF JUDGE SLEDGE: If you can't
8 hear, I wonder why you sit at the rear of the
9 room.

10 MR. STEINTHAL: Your Honor, it
11 appears that the interrogatories were served
12 but not filed under the current system. So
13 we're going to mark those as Services Exhibit
14 30.

15 (Whereupon, the document
16 was marked as Services
17 Exhibit 30 for
18 identification.)

19 MR. STEINTHAL: And I would offer
20 them into evidence at this time. If they get
21 into evidence, we will put the number on when
22 we gather the binders together for Your Honors

1 as the documents in evidence. And this would
2 be one of those documents that would be under
3 the sealed record, Your Honor, concerned with
4 the financial information.

5 CHIEF JUDGE SLEDGE: Any objection
6 to the Service Exhibit unnumbered?

7 MR. SMITH: I do object, Your
8 Honor. I don't think a party should be able
9 to put their entire set of interrogatory
10 responses into the record and given that we
11 haven't had an opportunity to cross examine
12 this there's a whole variety of different
13 topics covered here that have nothing to do
14 with the questioning that just occurred.

15 This was a discovery document.
16 It's generated by Mr. Steinthal's client and
17 if they want to put this evidence on, they
18 should have to put somebody on the chair that
19 we can cross examine.

20 CHIEF JUDGE SLEDGE: Mr.
21 Steinthal?

22 MR. STEINTHAL: Your Honor, I have

1 no problem. We'll put it through our witness
2 if that would satisfy Mr. Smith. Ms. Winston
3 from AOL will be testifying and she'll be able
4 to authenticate the information contained in
5 the interrogatory answer. So I don't mind
6 waiting. All right.

7 CHIEF JUDGE SLEDGE: All right.

8 BY MR. STEINTHAL:

9 Q All right. Now another category
10 of costs that you assume is a 20 percent
11 advertising commission costs so that basically
12 when webcasters pay their advertisers, you're
13 deducting 20 percent for purposes of your
14 modeling, is that right?

15 A That's correct.

16 Q You're aware, are you not, that
17 Ronning Lipset Radio is the advertising agency
18 employed principally by AOL, Yahoo, Live365
19 and Microsoft in connection with the sale of
20 in stream ads?

21 A My understanding is they are now.

22 Q And it's your understanding, is it

1 not, that their commission is 25 percent?

2 A I didn't know that exact number,
3 but given their extraordinary evidence in
4 generating advertising revenues for these
5 companies it wouldn't surprise me if they were
6 able to charge a premium.

7 Q Again, that's a bit of information
8 that surfaced to you for the discovery process
9 that did not corroborate your cost
10 assumptions, right?

11 A That's correct.

12 Q Now the amount of the surplus in
13 your mind --

14 A Let me just clarify. I don't
15 recall specifically that commission rate. But
16 if it is indeed the case that as you state
17 their rate is 25 percent, that would not
18 corroborate.

19 Q Just to be clear, the amount of
20 the surplus that you calculated for purposes
21 of getting to your ultimate proposed royalty,
22 that surplus would change if the cost

1 assumptions upon which you were relying
2 understated the actual costs of the
3 webcasters, right?

4 A Yes, they would change
5 proportionate. If there's a change out in the
6 second or third decimal place, that would
7 change the second or third decimal place of my
8 estimate.

9 Q Wherever it is, it is.

10 A Yes.

11 Q If the costs increased, the
12 surplus would decrease, right?

13 A That's exactly how it works.

14 Q Now, I'm going to ask you to take
15 a look at Ting and Wildman, their report,
16 previously been marked as Exhibit 15. Just a
17 couple of things about this before we move on.

18 Now earlier today I read you from
19 the first paragraph of this on page 1 --

20 A Yes, I recall.

21 Q And as of September 29, 2002 you
22 agreed with the conclusion expressed here

1 including, and I'm reading it from that
2 paragraph, "Although audience size has
3 increased significantly, advertisers have not
4 embraced this new medium as anticipated.
5 Furthermore, while costs have declined
6 remarkably, they are not near low enough for
7 profitability given the ad revenues the new
8 services have been generating or can be
9 expected to generate for at least the near
10 future."

11 You agree that was a correct
12 statement at that time, right?

13 A I probably wouldn't have phrased
14 it quite that way, but I agree that that
15 characterized the reigning attitude and
16 beliefs of that time period.

17 Q But by three years later according
18 to your modeling in 2005 the webcasters were
19 making a significant amount of profit per hour
20 before take in consideration sound recording
21 royalties, right?

22 A Especially in the subscription

1 business, that's correct.

2 Q Well, even in the nonsubscription
3 business, if I can get my math right, you've
4 got weighted total net revenues after PRO
5 royalties of 2.89 cents per hour and costs of
6 about --

7 A Well, yes, so there's weighted
8 revenues, that includes the subscription.

9 Q Right.

10 A So. Okay. I thought you were
11 going to talk about advertising.

12 Q So you're taking them both
13 together, right?

14 A That's what the weighted number
15 does.

16 Q Right. And just be clear, the
17 nonsubscription is 2.66 cents per hour, right?

18 A Yes. That's this number right
19 here.

20 Q All right. Just the advertising,
21 right?

22 A That's correct.

1 Q So your weighted average is 2.89
2 cents per hour, your costs if I add them
3 correctly are .8 cents -- I'm sorry. Yes, .8
4 cents an hour the fixed cost per listener hour
5 of 2.1 cents and the bandwidth cost of .59 per
6 hour, right?

7 A Yes.

8 Q So you get to basically an income
9 before sound recording royalties of 2.09 cents
10 per hour, right?

11 A Yes, that's correct.

12 Q So we go from a situation in
13 September of 2002 as described by Ting and
14 Wildman on page 1, which is pretty bleak, to
15 income of 2.09 cents per hour. Where between
16 September 2002 and your model of 2005 when did
17 it start breaking in favor of the webcasters?
18 Do you have any information as to how that
19 segmented itself along those three years?

20 A Yes, I do.

21 Q What is it?

22 A Well, some of this -- what is

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1 called privileged? I mean, you want me to
2 refer to specific -- I have data from specific
3 companies.

4 Q Well, you got the data in
5 discovery, right?

6 A Yes.

7 Q All right. Let's do this based on
8 your state of information before discovery.
9 And then if you want to tell us how it was
10 corroborated by discovery, I'm happy to let
11 you do that.

12 A Sure.

13 Q When you did your report did you
14 have any information as to where along the
15 spectrum between the September 2002 report and
16 2005 things broke from the condition Ting and
17 Wildman described to income of over 2 cents an
18 hour before sound recording royalties?

19 A Yes. My belief before discovery
20 was it happened quite recently that the
21 industry had -- was just really becoming
22 profitable and was on the verge of a real

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1 takeoff. And I think that's the way I
2 described it in the report or some words to
3 that effect.

4 After discovery I looked at the
5 actual webcaster revenues and without saying
6 the names of any companies, I found that the
7 actual revenues were not 2.66 for advertising,
8 but about 3.59 cents for the advertising area
9 and for subscriptions were somewhat higher. I
10 don't have it off the top of my head here.
11 Most of that happened in the third and fourth
12 quarter of 2005.

13 And in 2006 in discovery we were
14 given data up through February 7th by Ronning
15 & Lipset the advertising rep firm you
16 described. And as of February 7, 2006 they had
17 sold more ads for most of the major companies
18 than they had in all of 2005. They had sold,
19 as I recall, about 115 percent more ads for
20 Yahoo than they had in all of 2005. I think it
21 was double for some of the other companies.

22 So in answering your question, it

1 is a very recent takeoff. Even more recent
2 than I anticipated. Also in discovery Yahoo
3 provided some information that said that their
4 year over year advertising revenue growth from
5 2004 to 2005 was over 100 percent, which
6 exceeded their own internal projections. And,
7 again, as I mentioned between 2005 and -- the
8 February 7, 2006 it has again increased quite
9 rapidly.

10 So we're really sort of at the
11 takeoff stage right now.

12 Q Well again you're right. And if
13 we had done this model in early 2005 as
14 opposed to early 2006, you'd have a totally
15 different answer, wouldn't you?

16 A Than I would have based on my
17 knowledge and expertise seen that there's this
18 potential for takeoff as I described in there,
19 and I think I would have anticipated, as most
20 of the industry analysts did if you look at
21 the analyst report, but we wouldn't have
22 actually seen the data on the ground for the

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1 takeoff that we all were anticipating whether
2 it's the webcasters, the analysts on Wall
3 Street or myself who have been studying this
4 industry for 15 years, the Internet for that
5 period.

6 Q But, I'll press it again, if you
7 had done your model based on information in
8 existence in early 2005, you'd have a totally
9 different surplus that you were looking at
10 because none of the information that reflected
11 this growth in the last two quarters of 2005
12 would have been information that was available
13 to you, right?

14 A Well, I like to think that I would
15 have made similar kinds of projections knowing
16 about the fundamentals of the industry. And
17 that's certainly the kinds of projections
18 other people were making. We wouldn't have had
19 the corroborating evidence, so I think it
20 would have been a bigger bound of uncertainty.
21 Now most of the uncertainty has been resolved.
22 We have seen that indeed they are looking at

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1 the kinds of revenues that a lot of people
2 anticipated they would.

3 Q Do you think that a Board like
4 this should engage in rate setting based on
5 events and circumstances that are quite
6 cyclical?

7 A I believe that the Board should do
8 its best job using the available data to set
9 the price that a willing buyer and a willing
10 seller would agree to. I believe a willing
11 buyer and a willing seller would look at
12 essentially the same evidence that we're
13 looking at. In some ways we have better
14 evidence insofar as we have discovery so we
15 know what the costs and revenues are to a
16 greater level of detail than the buyer and
17 seller might. So in some sense we're in a
18 better position to be able to do what a
19 willing buyer and a willing seller would do in
20 a free market meeting. I think that's what
21 we've been asked to do, and that's what I'm
22 doing -- trying my best to do.

1 Q Take a look, if you will, at page
2 4 of the Ting and Wildman report. Right under
3 paragraph A it states: "In comparing Internet
4 radio and OTA," meaning over-the-air radio
5 costs, "we consider only the personnel and
6 technology costs attributable to transmitting
7 programming to listeners."

8 You don't have any reason to doubt
9 the accuracy of that statement, do you?

10 A No, I don't.

11 Q Take a look on page 5, if you
12 would? Underneath the chart. There's a
13 sentence that says: "In addition to these
14 complications," and let me read the first part
15 of this so that there's a reference to it.
16 The top of the page: "The different models of
17 network network produce different cost
18 structures and different levels of operational
19 flexibility. Table 1 summarizes the
20 operational considerations for a resolution.
21 See Appendix 1 for a detailed discussion.

22 In addition to these complications

1 webcasting is also fundamentally distinct from
2 traditional broadcasting in a network
3 transportation aspect. Figure 1. Also see
4 Appendix 2 for details. The point-to-point
5 structure depicted in Figure 1 shows that
6 requests for the same programming result in
7 duplication of data streams and cause backbone
8 bandwidth consumption to increase in
9 proportion to the number of requests. This
10 explains why the technology cost of
11 distributing the programming increases with
12 the number of listeners or viewers reached.
13 The picture for over-the-air broadcasting is
14 a lot simpler because the distribution costs
15 for an over-the-air broadcaster do not vary
16 with number of people tuning into it signal."

17 You agree with that portion of the
18 Ting and Wildman report, do you not?

19 A Yes, that's correct.

20 Q Take a look at page 7 of the Ting
21 and Wildman report under cost analysis. I
22 already read in and asked you some questions

1 about the first paragraph under cost analysis.
2 Let me show you the second paragraph where it
3 says: "Quite a few variables might cause
4 costs to vary widely. Tradeoffs can be made
5 between costs and quality (data processing
6 quality, transmission quality, service quality
7 such as system down time, et cetera). Also
8 significant price dispersion with respect to
9 various suppliers, geographical market,
10 individual conditions such as longer distance
11 between company site and the data center of
12 network service providers and traffic patterns
13 can be observed for all three technology cost
14 components."

15 Do you agree with that?

16 A I think that was an accurate -- I
17 believe that was an accurate statement of the
18 description of a relatively young immature
19 industry in 2002, yes.

20 Q All right. Agreeing that that was
21 right?

22 A I believe that was an accurate

1 description of that relatively young and
2 immature industry in 2002, yes.

3 Q Well, that young and immature
4 industry in 2002 was the industry that Ting
5 and Wildman had before it when it created the
6 cost assumptions and revenue assumptions it
7 made, correct?

8 A Yes, that's correct.

9 Q And you would agree with me, would
10 you not, that it is riskier in making
11 projections to look at costs and revenue
12 assumptions in a immature industry that
13 doesn't have much of a track record than for
14 example in a much more mature industry?

15 A In this particular industry that
16 we're talking about we're able to triangulate
17 on the values for fixed cost from a number of
18 different points and they give a consistent
19 answer, although the other data I have
20 suggests a somewhat lower fixed costs than the
21 ones that Ting and Wildman provided.

22 Q Would you agree with the

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1 proposition all other things being equal that
2 it is much riskier to project to the future
3 cost issues and revenue issues when you're
4 dealing with a young immature industry than
5 when you're looking at a mature industry in
6 which there is a substantial track record?

7 A For many components of cost and
8 revenues that's true. For some components
9 like bandwidth, I think they're proven to be
10 remarkable predictable despite the fact that
11 it's a new industry. So I don't think that's
12 an accurate general statement

13 Q And on page 13 to 14 where Ting
14 and Wildman state under revenue and cost
15 comparisons Internet radio over-the-air radio.
16 States "Revenue and cost comparisons for over-
17 the-air and Internet radio show Internet radio
18 to be at a considerable disadvantage on both
19 counts. Table 3 compares average distribution
20 cost to average revenues for Internet radio
21 services applying the average price paid for
22 over-the-air audiences reported above. At

1 current levels the picture that emerges is not
2 an optimistic one."

3 Again, you would agree with that
4 as of September 2002, correct?

5 A Yes, as of September of 2002.

6 Q And then if you turn to page 16.
7 Ting and Wildman report in the first full
8 paragraph "Comparing the costs and revenues of
9 Internet and over-the-air radio shows that
10 under current cost structures Internet radio
11 stations operate at a considerable cost and
12 revenue handicap to over-the-air stations even
13 if we ignore their considerably smaller
14 audiences."

15 Now, do you agree with that
16 statement?

17 A I think it's taken somewhat out of
18 context, but that is what the statement says
19 there. I would be happy to provide the context
20 based on my fuller reading of the article.

21 Q If Mr. Smith wants to go back and
22 ask you some questions about the document,

1 he's free to. But that statement was in
2 reference to cost structures inclusive of the
3 rates set in the first CARP, not a rate three
4 times higher, correct?

5 A Yes. That's correct.

6 Q Take a look under IV on page 17.
7 This part of the report is entitled "A Model
8 of Over-The-Air and Internet Radio Pricing."
9 See at the bottom where it says starting with
10 the sentence to date. "To date internet radio
11 services like other internet-based advertising
12 vehicles has relied primarily on
13 advertisements placed on the website accessed
14 to access their audio streams. By contrast,
15 over-the-air radios sells within program
16 commercial time which has the advantage of
17 being more difficult to ignore than display
18 ads positioned around a primary content on a
19 website. It would seem natural for Internet
20 radio services to turn to in program ads
21 themselves and with development in in stream
22 insertion technology some Internet radio

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1 services have started to sell in program
2 commercials."

3 Do you see that?

4 A Yes.

5 Q Do you understand that to be an
6 accurate statement?

7 A I think it just shows how immature
8 the industry was back in 2002 in terms of
9 their ability to capture revenues.

10 Q Because that's contrary to what
11 you testified to, right?

12 A No.

13 Q Well, that was too broad a
14 statement for me to make. Let me rephrase it.

15 You testified on your direct, did
16 you not, that the most valuable component of
17 radio advertising in your view was visual
18 gateway ads, right?

19 A That was an especially lucrative
20 category, that's correct.

21 Q And you're familiar with the
22 testimony of Ronning & Lipset in this case?

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1 A I believe I read it.

2 Q So you're familiar with their
3 testimony to the effect that visual gateway
4 advertisements are not desired by advertisers
5 for Internet radio because precisely because
6 there's a concern by advertisers that people
7 listening to an audio experience won't be
8 watching their screen as distinguished from in
9 stream advertising when if you're listening by
10 definition you're going to be exposed to
11 what's being played, right?

12 A Well, there are several things I
13 need to say in answer to that.

14 First of all, when you refer to
15 Ting and Wildman one of the points they make
16 in their article is that they expect that over
17 time Internet radio will converge to have
18 revenue per listener hour comparable to over-
19 the-air radio, in part because they can do all
20 the things that over-the-air radio does and
21 then some. So when you selectively pick an
22 earlier, you know one particular sentence and

1 you don't give their overall view of the
2 market, I don't think that's a fair
3 representation. In contrast, my models don't
4 have the revenues converging to the level of
5 over-the-air during the period. It would
6 sometime out past 2010. So in that sense I'm
7 being more conservative than Ting and Wildman.

8 Secondly, regarding the in stream
9 video gateway banner adds and so forth, I said
10 on direct that each of the different
11 categories that I've put up there when we got
12 the actual data, we didn't always get each one
13 exactly right but that the bottom line ended
14 up being consistent with what I estimated. In
15 fact, some were greater. Naturally, we're not
16 going to hit everyone of those on the nose. In
17 fact, I think I probably over estimated the
18 audio in stream component somewhat, but I
19 under estimated the other components
20 somewhat. What matters for purposes of rate
21 setting is, of course, the bottom line, the
22 total revenues that are earned. It's not

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1 particularly important exactly how they get
2 divvied up.

3 So, you know, Ronning & Lipset are
4 very familiar with what's going on and I would
5 certainly put a lot of weight in terms of
6 where they see they're able to sell ads.
7 They've been very successful in selling more
8 ads through February 7th of this year than
9 were sold in all of last year for several of
10 the webcasters. And I'm not going to quibble
11 about exactly which type of advertising is
12 going to be the one with the lion's share.

13 What's important for our purposes
14 is what's the bottom line here. And the
15 bottom line that I provided is consistent with
16 the bottom line that was on discovery, except
17 mine were somewhat conservative.

18 Q Okay. I'm not sure this is a
19 quibble. One of your four primary revenue
20 streams that you used to calculate projected
21 revenues for the webcasters is gateway ads for
22 Internet audio, right?

1 A That's correct.

2 Q And your testimony that you
3 believe that is a viable form of advertising
4 and you use a 90 percent sell through rate for
5 that advertising, do you not?

6 A Yes, I do.

7 Q So for your projections you rely
8 on an assumptions that's just flat out
9 inconsistent with what Ronning & Lipset said
10 about the current state of the market with
11 respect to the ability to sell video gateway
12 ads for Internet audio, right?

13 A I wouldn't say that. What I would
14 characterize it as is that when I described
15 these different categories and I came up with
16 this value 2.66 cents, I did include video
17 gateways, as you suggested. When we got the
18 actual data a very large webcaster did not
19 include any video gateways, just as you said.
20 Despite not including a single penny for video
21 gateway advertising, they still ended up with
22 more total revenues per listener hour than I

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1 had in my model because they made that much
2 more in the other categories.

3 It's my expert opinion that if
4 they had wanted to they could have included
5 the video gateway ads in addition which would
6 have raised the revenues even harder. And my
7 best estimate based on my knowledge of this
8 industry and similar industries is they made
9 a conscience choice not to run the video
10 gateway ad because putting an ad before people
11 have to listen to streams is somewhat
12 intrusive and would make it a slower growth in
13 a number of subscribers signing up and a
14 number of listeners signing up. So they made
15 a choice that they would tradeoff current
16 revenue, have less current revenue than they
17 could have in order to more rapidly grow their
18 stream so they could make money in the future.
19 That may well be a wise business decision, but
20 that reflects in investment in the future. It
21 doesn't reflect in attempt to maximize current
22 revenues.

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1 In fact, other webcasters
2 including AccuRadio and others, I don't
3 remember off the top of my head, do include
4 video gateway ads showing that it's perfectly
5 technologically feasible and they are quite
6 profitable for them.

7 Q Do you believe you have more
8 expertise in the context of selling
9 advertising on Internet radio than Ronning &
10 Lipset does?

11 A I believe I have a great deal of
12 expertise in marketing on the Internet. As I
13 mentioned, I had created the first course in
14 this. I've been given awards for that. I think
15 I'm quite knowledgeable about how marketing
16 works.

17 I've talked to the major people
18 who are involved in Internet advertising.
19 However, I'm just giving my objective opinion
20 about what I think are the motivations for
21 people to run certain types of ads. I don't
22 have any of these companies as my clients. My

1 salary does not depend on them. I am in no
2 way -- I'm just calling them as I see them.
3 I'm not sure that everybody who -- well, let
4 me just say that I'm giving my best objective
5 opinion based on my expertise.

6 Q Now I believe in response to my
7 question to you about Ting and Wildman said on
8 page 17 to 18 you testified that Ting and
9 Wildman in their report expected that Internet
10 radio ads would overtake over-the-air radio?
11 Is that your testimony?

12 A I believe I testified that they
13 expected them to converge towards the level of
14 over-the-air radio.

15 Q Let me draw your attention to page
16 2.

17 A Yes.

18 Q The first full paragraph. The
19 paper's organized as follows: Section 2
20 defines Internet radio as the term as employed
21 for this study and distinguishes it from other
22 Internet audio services. Section 3 provides

1 comparisons of the over-the-air radio revenues
2 and costs to various measures of Internet
3 radio revenues and costs. Section 4 presents
4 a simple model that suggests that as long as
5 Internet radio services reach a significantly
6 smaller fraction of the aggregate audience for
7 radio-like services, they will have to charge
8 lower per listener rates to advertisers unless
9 their listeners largely stop listening to
10 over-the-air stations.

11 Does that support your view that
12 there's going to be convergence?

13 A If you'll just give me a moment,
14 I'll answer that.

15 Yes. So the text I was referring
16 is on page 11, okay, the last paragraph. It
17 says that the average revenue per listener
18 hour derived from Duncan Radio data -- and we
19 the average -- this is for -- is 8.68 cents
20 per listener hour to calculate the projected
21 advertising revenue for webcasters, which we
22 assume that when the webcasting is a mature

1 industry, it will generate per listener ad
2 revenue equivalent to over-the-air radio. Now
3 part of the reason that it's not generating
4 those now is because -- and it hasn't shortly
5 -- because it's an immature industry with poor
6 matrix, unlike the over-the-air radio. Also
7 they present the model which, you know, is
8 probably not worth going into detail, but the
9 essence of it is that when you have a very
10 small audience, people will pay you a lower
11 cost per thousand than when you have larger
12 audience. In other words, 10 people who have
13 10 percent of the audience wouldn't get as
14 much revenue as one person who had a 100
15 percent of the audience. These main
16 broadcasters want to reach a very broad group,
17 and that's the part that I think you were
18 referring to in the beginning that when
19 webcasting is small they're at a disadvantage
20 because many broadcasters don't want to go --
21 many advertisers don't want to reach just a
22 small number of people. But as webcasting

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1 becomes large, that is one of the forces
2 that's going to lead it to have a revenue per
3 hour comparable to over-the-air radio.

4 Now this is not just my opinion.
5 It's not just Ting and Wildman's opinion. I
6 believe one of your own witnesses Bob Roback
7 said that he thought that web advertising
8 presented a better proposition for advertisers
9 than over-the-air radio.

10 So I think that it's -- I don't
11 make that assumption. My assumption, just to
12 be clear, is more conservative than this. But
13 there's certainly lots of evidence you could
14 go towards the higher values that Ting and
15 Wildman and others have suggested.

16 Q Just to be clear, I've read
17 various parts of Ting and Wildman, I don't
18 want to go back to that talk about radio
19 situation verses Internet radio. This that
20 you're referring to refers not to Ting and
21 Wildman's view, but an average revenue per
22 listener hour derived from Duncan Radio data,

1 right? It's not the Ting and Wildman
2 conclusion expressed in this document?

3 A Well, they take the average across
4 this range. They use it.

5 Q But the reference you made was to
6 a statement attributed to Duncan?

7 A Which they are using, which they
8 are affirming.

9 Q Let's take a look at your Table 6
10 which is up on the board. You started looking
11 at that before. And you agreed with me that
12 your projection for 2005 presumably if I
13 understood your testimony this morning based
14 on your regression analysis that you used from
15 the Ting and Wildman data, you came up with
16 the figures under 2005, right?

17 A No. It's not nearly that
18 mysterious. The only place where we did some
19 extrapolation for fixed costs, and I think
20 it's giving it too much sophistication to call
21 it regression analysis, is that we --

22 Q Your words.

1 A Is that we updated for size
2 proportionally some of the Ting and Wildman
3 data just for this one number right here.
4 And, frankly, you could cut that number in
5 half, you could double it, it wouldn't have a
6 material effect on the bottom line.

7 Q Well, just that one number, the
8 more you increase the less the surplus, right?
9 It doesn't matter how much?

10 A If you would increase it, it would
11 decrease the surplus. I think in reality the
12 true costs are likely to be less than that
13 value.

14 Q Okay. Using -- you know, I don't
15 know what to do now because you don't want to
16 regression analysis, which was your word. But
17 whatever extrapolation you did you came up
18 with figures in 2005 and we have, do we not,
19 2.09 cents in income per hour based on your
20 projections before consideration of the sound
21 recording royalty, right?

22 A Yes, that's correct.

1 Q Okay. Now, you calculate using
2 your model that the sound recording royalty
3 should be 3.37 cents per hour?

4 A Actually, I think the relevant
5 column would be the one over here 2006, isn't
6 it? So that would be --

7 Q Okay. Even better yet. 4.37
8 cents per hour, right?

9 A Exactly. Yes.

10 Q So your postulating, if I get this
11 right, that a willing buyer would pay twice as
12 much, even more than two times as much as
13 their income from everything else just for the
14 rights to sound recording? I'm doing the math
15 right, right? 4.37 cents

16 A Yes.

17 Q What your suggest your model would
18 yield as a royalty against 2.09 cents in
19 income in 2005, right?

20 A Well, I think the relevant column
21 is probably the 2006 one, which is the one we
22 were just talking about. So it's this much of

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1 an increase in surplus. They're making 4
2 cents more than they did during this period
3 per listener hour and they'd be paying about
4 4 center more royalty.

5 Q Well, stick with me then on the
6 2005 data for a minute. The end of the year,
7 you know presumably you negotiate your 2006 to
8 2010 license before the license term starts,
9 right?

10 A Well, we have the luxury of
11 actually having some data from 2006, I think
12 we may as well use it.

13 Q Is it not true that your model
14 would suggest that the correct royalty based
15 on 2005 would be 3.37 cents as against a
16 webcaster that's earning 2.09 cents in income
17 before consideration of the sound recording
18 royalty?

19 A Well, that's already tracking this
20 amount. So just to be clear, this amount
21 leaves them with a profit -- all of these
22 amounts down here leave the webcasters with a

1 profit. In fact, they get 25 percent of the
2 surplus and the providers of the sound
3 recordings get 75 percent of the surplus. So
4 both parties are getting a surplus. The way
5 you're describing it --

6 Q Now, wait a minute. Wait a
7 minute.

8 A Yes. Okay.

9 Q I'm going to do this step-by-step
10 and you tell me where I'm wrong.

11 A All right.

12 Q Under 2005 the resulting statutory
13 sound recording royalty per listener hour you
14 calculate using your model as being 3.37
15 cents.

16 A You're referring to this number?

17 Q Yes.

18 A Yes, that's correct.

19 Q And you agree with me that if you
20 take your weighted total net revenues after
21 PRO royalties of 2.89 cents per hour and you
22 subtract your costs, you get to income before

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1 consideration of the sound recording royalty
2 of 2.09 cents per hour, right?

3 A You referring to this?

4 Q No. No.

5 A Wait a minute. Where?

6 Q I'm looking -- I thought we
7 established this, so I asked you these
8 questions before. Weighted total net revenues
9 after PRO royalties--

10 A Oh, okay.

11 Q -- is 2.89 cents, right?

12 A Yes, that's correct.

13 Q And if you deduct the cost that
14 you've calculated --

15 A Yes.

16 Q -- you have basically through your
17 model you've calculated that the costs are a
18 combination of fixed costs per listener hour
19 of .21 and bandwidth cost per listener hour of
20 .49, so it's .8 cents. So 2.89 minus the .8
21 equals income before determination sound
22 recording royalty of 2.09 cents per hour,

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1 right?

2 A Well, that's not the way model 1
3 works.

4 Q Okay. Just please humor me.
5 That's what it says, right?

6 A No. I think you're misusing model
7 1. If you'd like, I'll explain it or --

8 Q Just answer whether in fact under
9 your modeling the revenue per hour that you
10 projected for 2005 on a weighted basis was
11 2.89 cents per hour. Yes?

12 A I think I have to explain how
13 model 1 works if you're going to be using it
14 conclusions. Because you're --

15 Q No. With all due respect, sir --

16 A -- mixing and matching different
17 numbers in a way that just isn't appropriate.

18 Q Tell me what is inappropriate
19 about my reading that line --

20 A Okay. I'd be happy to.

21 Q Now let me ask the question. What
22 is inappropriate about concluding that the

1 weighted total revenue per hour is 2.89 per
2 cents per hour in 2005? What am I reading
3 wrong?

4 A Okay. The premise of model 1 was
5 that a willing buyer and a willing seller came
6 together and made an agreement in 2001/2002
7 during that period. So what model 1 does is it
8 looks at how the surplus has changed since
9 that period. Has there been an increase in
10 revenues, has there been a decrease in costs,
11 have there been other changes that are
12 relevant? This looks at the changes since
13 that period and the underlying assumption is
14 that if they're willing, perhaps because of
15 benefits to their other businesses or for
16 whatever reason, to come to an agreement at
17 this period at this price, then we can update
18 that to the new price based on the visible
19 changes in circumstances.

20 And what this shows is how those
21 numbers change, how they were updated. And you
22 can see that since that period there's been a

1 increase in economic value of about 3 cents.
2 So a fraction of that economic value is kept
3 by the webcasters and a fraction is captured
4 by the sound recording royalty. Now in fact
5 the actual increase in economic value appears
6 to have been greater than what I estimated.
7 But the use of model 1 -- I think what you're
8 trying to do is something that model 2 is,
9 which involves a set of numbers that doesn't
10 start with what happened back then.

11 So if you want to just look at the
12 numbers just the way they are without starting
13 with the previous period, you need to use
14 model 2 and not model 1.

15 Q With all due respect, sir, what is
16 wrong about my reading that your model results
17 in revenue, weighted total net revenues per
18 hour of 2.89 cents per hour in 2005? Isn't
19 that what happened when you took Ting and
20 Wildman and you brought it current to 2005?

21 A Ting and Wildman had nothing to do
22 with the weighted net revenue of 2.89 cents

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1 that you're referring to.

2 Q Okay.

3 A So I mean you're mixing and
4 matching different data sources in different
5 pieces. If you'd like to do -- actually we've
6 done it. We went through it quite carefully.
7 It's in model 2. It's all there. You don't
8 have to sort of twist and turn this one to do
9 what you're trying -- it's already been done.

10 Q What is twisting and turning,
11 with all due respect, a line item in your
12 model? Doesn't that mean weighted total net
13 revenues after PRO royalties of 2.89 cents
14 per hour? Yes or no. I thought you conceded
15 that 15 minutes ago.

16 A That's what that number is. But
17 the way you're trying to use it is not --
18 you're not adding the numbers together in the
19 correct way.

20 Model 2 is designed to do exactly
21 this.

22 Q I'm not trying to use it in anyway

1 other than to understand a few things. So
2 you're with me?

3 A You know, it's complicated enough
4 --

5 CHIEF JUDGE SLEDGE: Mr.
6 Steinthal, he's given you very clear answers,
7 you're just not satisfied with his answers.
8 Can you move on to something else since he's
9 answered that question?

10 MR. STEINTHAL: Your Honor, I --
11 I'll try to ask it this way.

12 BY MR. STEINTHAL:

13 Q Is it your testimony that a
14 willing buyer would agree to pay a royalty in
15 2005 based on your model that looks at the
16 left hand part of this for a minute before we
17 go to the right hand side, of 3.37 cents per
18 hour?

19 A Model 1 generates that royalty
20 estimate. Model 2 generates a slightly
21 different one. And I looked at both of those
22 to come up with my recommendation.

1 Q Okay. Now --

2 A But, really, it's not nearly as
3 complicated as you're making it seem. I think
4 it's actually laid out quite simply. And if
5 you want, I think I can explain it very
6 simply. But -- you know, my goal is just to
7 make it as simple as possible.

8 Q And is it your testimony then that
9 a willing buyer agree to a pay royalty for
10 sound recordings that is one and a half times
11 its income from its operation?

12 A It's my testimony that a willing
13 buyer and willing seller would in the
14 marketplace be willing to pay 75 percent of
15 the surplus generates to an essential -- a
16 group of people who have provided one of the
17 essential inputs who have a lot of bargaining
18 power. They would keep 25 percent. They would
19 pay 75 percent. If you don't like that exact
20 bargaining, it's easy to plug in 50 percent or
21 80 percent or 90 percent. But my best
22 estimate is that 75 percent is a lower

1 estimate of the share of how the surplus would
2 be divided.

3 Both parties would keep some of
4 the surplus.

5 Q Well you assume that somebody keep
6 some of the surplus even if paying the royalty
7 you posit would result in losing money by
8 operating the service to the tune of a penny
9 and a half per hour, is that right?

10 A No, that's not right. I think the
11 exercise you're trying to do is in model 2.
12 This exercise assumes -- okay. Takes into
13 consideration that there may be other factors
14 in play that lead them to agree to a rate in
15 2002. You know, there's testimony from
16 discovery that these services are very
17 valuable to other parts of their businesses.
18 If you want to put significant -- you know
19 serious consideration to those facts, then
20 model 1 would give you a way of estimating
21 what the value is of those -- and how those --
22 and how things have been updated since then.

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1 If you don't want to consider those, we have
2 a model for that and I'm happy to walk you
3 through it rather than try to use this one.

4 Q Well, you were referring to 2006,
5 right? So under 2006 according to this --

6 A Yes.

7 Q -- you project that the webcasters
8 will have weighted net revenues of slightly
9 over 4 cents an hour --

10 A Yes.

11 Q -- and costs of if you add up the
12 cost per hour of .19 cents and .53 cents,
13 you've got costs of .72 cents. So if I do the
14 math right, we've income of \$3.42 per hour
15 before consideration of the sound recording
16 royalty, right?

17 A Again, that is not how this model
18 is used. Maybe an analogy would help.

19 When the recording companies make
20 their songs available for downloads, like
21 iTunes or to WalMart, they sell them for 70
22 cents. I think some of the documents you

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1 showed us this morning had even indies getting
2 70 cents. Those recordings are often sold for
3 88 cents or 99 cents, something like that. By
4 the time you take out credit card processing
5 fees and all the other costs of running the
6 operation, the retailers are making basically
7 zero, maybe even making losses. Why do they
8 do? Well, because they see other benefits of
9 doing it. Maybe Apple makes thinks that they
10 draw more business to their brand name or
11 WalMart thinks they can get more people to
12 come into the store. There may be some other
13 benefits that aren't quantified in the cost
14 and revenues that lead them to go ahead and
15 pay 70 cents for a download even though that's
16 probably more tan 100 percent of their direct
17 revenues.

18 And given that the webcasters have
19 stated that they have large benefits. For
20 instance, Launchcast Free is the primary
21 promotion vehicle for Launchcast Plus.
22 Launchcast Plus is enormously profitable yet

1 Bob Roback said that he wouldn't bother
2 offering Launchcast Plus if he couldn't offer
3 Launchcast Free as well. That's suggests a
4 lot of that profit in Launchcast Plus wouldn't
5 exist if it weren't for Launchcast Free.
6 That's one example of the kind of benefit
7 they're getting in different parts of
8 businesses. They're getting ad revenue
9 elsewhere.

10 So that's not explicitly in any of
11 these numbers here, except that it's taking
12 into account from the fact that a willing
13 buyer and a willing seller -- on the
14 assumption that a willing buyer and seller
15 would have agreed to this rate back in 2001.
16 The previous CARP did their job. We can base
17 our analysis on that number and simply update
18 it based on the circumstances we know have
19 changed since then. That's what model 1 does.

20 Q I'm glad you went way out of your
21 way to answer for many minutes a question that
22 wasn't asked. But let me ask you this: It

1 appears from your answer that the reason why
2 somebody or some entity would pay under your
3 model more for sound recording license than
4 the entire income that it has from the rest of
5 its operation preconsideration of sound
6 recording royalty costs is because of these
7 other benefits that they might derive? Is that
8 your testimony?

9 A Model 1 is based on that analysis.
10 Model 2 does not make that kind of analysis.

11 Q Doesn't model 2 base itself on the
12 projected 2006 to 2010 costs --

13 A Well --

14 Q Wait a minute. Let me finish.
15 Your costs and revenues projected 2006 to 2010
16 capture the surplus and then calculate your
17 fee? What am I missing?

18 A If you'd like we could put model 2
19 and we'll have the answer in front of us.

20 Q I can't seem to find it in the --

21 A Well, we shouldn't let that be the
22 determination.

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1 Q Well, tell us what page of your
2 report it's on.

3 A All right. I'm looking for it
4 here.

5 So in model 2 we have the weighted
6 total revenues per listener hour and we --
7 let's see. Yes, this is -- yes, this is
8 combining the advertising and the subscription
9 rates. So this is already summarizing. Yes,
10 I guess we could --

11 Q You know what? Let's take a look
12 at something. Let's look at one over the
13 other. This is fascinating to me.

14 I believe you testified that the
15 costs and revenues that you relied on for
16 model 2 are the identical cost and revenues
17 you relied on for model 1, right? It's not
18 from different sources? It's the same stuff?

19 A Yes. Yes. Sorry.

20 Q So how do we get to in 2006 under
21 Table 10 the weighted total revenues per
22 listener hour of 3.35 when the projected

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1 number for weighted total net revenues here is
2 4.14? Is it just a question of netting out
3 the PRO royalties? Up here you're netting out
4 the PRO royalties and here you're not?
5 Because isn't it true that Table 10 doesn't
6 show us what the costs are other than the
7 sound recording royalty telling us what the
8 revenue line is without the costs?

9 A Those are the revenues but it's
10 drawing on -- I believe it's Table 8 here. I'm
11 just matching it up.

12 Q Let me try to do this in sort of a
13 --

14 A Yes, and there are some
15 inconsistencies in terms of where I put the
16 performing rights organization costs and so I
17 apologize. Sometimes the costs are listed in
18 a couple of different places.

19 Q I'm really -- I'm not trying to be
20 argumentative here. I'm trying to understand
21 what you're saying.

22 If we go to 2006, okay? The

1 projected 2006 to 2010 are the same set of
2 numbers that you used for model 2, right?
3 There's no difference between the projected
4 numbers on Table 6 for 2006 to 2010 between
5 model 1 and model 2? You used the same set of
6 numbers right? It's not different?

7 A Yes. Yes.

8 Q Okay. And I got the logic of your
9 model when you testified on direct.

10 A Yes.

11 Q So bear with me. In 2003 it's
12 correct, is it not, that you would expect a
13 webcaster based on your modeling to have 4.14
14 cents per hour in net revenues after PRO
15 royalties, right? That's this one right here.

16 A I'm sorry. Yes.

17 Q And then you'd expect that they
18 would have costs of fixed costs of .19 cents
19 and bandwidth costs of .53 for a total of .72

20 --

21 MR. SMITH: Your Honor, I'm going
22 to object. He keeps taking the numbers from

1 the changes in revenue and changes in costs
2 and reports them to the witness as if they're
3 absolute numbers.

4 BY MR. STEINTHAL:

5 Q Isn't this the actual projected
6 weighted bandwidth cost per listener hour of
7 .53 cents? What am I missing?

8 A These lines are the changes and
9 those are the actuals.

10 Q This line right here? Weighted
11 bandwidth cost per listener hour, that's your
12 projected weighted bandwidth cost per listener
13 per hour for a webcaster, right? It's not a
14 change. That's what you project the cost is
15 going to be?

16 A This is the change? See, the
17 header here says changes. So these are the
18 changes.

19 Q But what does this number mean?
20 Isn't this number in your projections? Now
21 let's look at this part here. Projections.
22 Not model 1. We're not talking about

1 differentials, we're talking about actuality
2 in terms of your projections anyway. Isn't
3 this number your projected weighted bandwidth
4 cost per listener hour?

5 A That number -- yes.

6 Q Right.

7 A That number is.

8 Q And this one is your fixed costs
9 that you project per listener hour, .19 cents?

10 A Yes. That one.

11 Q So tell me where I'm going wrong.
12 If I've got 4.14 cents in net revenues per
13 hour after PRO royalties and .72 cents in cost
14 before considering the sound recording royalty
15 rate, I've got 3.42 cents per hour in income,
16 right?

17 A About that, yes.

18 Q Okay. And your model suggests
19 that a willing buyer with 3.42 cents per hour
20 in income before consideration of the sound
21 recording royalty would agree to pay 4.37
22 cents per hour with sound recording royalty?

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1 A Again, it depends on which model
2 you're looking at. If you look at this model
3 here that takes into account any benefits they
4 may be getting from other activities. If you
5 look at this model down here, you see the
6 number is smaller. That doesn't take into
7 account those other benefits. So is it your
8 preference to take into account those other
9 potential benefits implied in the fact that
10 they agreed to this earlier on? Of if you
11 don't want to take it into account, you can
12 use these numbers.

13 Q Oh, wait a minute. Wait a minute.
14 Wait a minute.

15 But the statutory royalty rate per
16 listener hour on average is .416 cents per
17 hour under your model 2, right?

18 A For the average for 2006 to 2010.

19 Q Right. And what's the number then
20 in 2006?

21 A I guess it's -- well, it depends
22 whether you want to include the 25 percent

1 growth in listener hours or not; which would
2 be your preference?

3 Q I want you to tell me what a
4 willing buyer under your model would pay a
5 willing seller in 2006 based on this model.

6 A These are the numbers right down
7 here. Can I put this up here for a second and
8 make it easier for everyone to see.

9 So, a willing buyer and a willing
10 seller would agree to pay these amounts per
11 listener hour, which corresponds to these
12 royalty rates.

13 Q Okay.

14 A That doesn't take into account the
15 fact that they're willing to pay more back in
16 2001, a willing buyer and seller were willing
17 to agree to a bigger share of the surplus back
18 then.

19 These values in model 1 to account
20 for that actually have somewhat larger numbers
21 because, as I've been saying, there are some
22 apparent spill over benefits. In my

1 recommendation I didn't take into account
2 those spill over benefits. I took into account
3 just a straight values that appear here and
4 appear in my recommendation.

5 Q So then under your model I would
6 pay 2.57 cents in sound recording royalties
7 against my 3.42 cents in income?

8 A Yes.

9 Q Okay.

10 A And that should be about 75
11 percent of the income if you do the
12 arithmetic. I can't quite do it in my head.

13 Q Right. And as you carry it
14 forward under your prior model these are the
15 annual numbers that lead you to the average of
16 the -- where does that average go?

17 A Well, I think the average you were
18 referring to before was the one down here.

19 Q Right. Of 4.16 per hour?

20 A Yes. Is that clear.

21 Q Oh, it's very clear.

22 A Good.

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1 Q I just don't how you set your
2 willing buyers, that's all.

3 MR. STEINTHAL: Your Honor, I
4 think this would be an appropriate time to
5 take a short break and I'll try to plow
6 through the rest of it as quickly as I can.

7 CHIEF JUDGE SLEDGE: Very good.

8 Mr. Smith?

9 MR. SMITH: Your Honor, since
10 we're taking a break, let me just note as we
11 discussed last Thursday we only had Dr.
12 Brynjolfsson for a relatively narrow window of
13 a couple of days. It is possible that he
14 could stay over for an hour or an hour and a
15 half testimony in the morning. He has a 2:30
16 class back in Boston. So I'm just raising that
17 as a concern.

18 It seems likely that given the
19 extended cross we've had so far from one party
20 we're not going to come near getting him done
21 even if he does stay over. So one question
22 will be at the end of the day should he stay

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1 over and try to rush back for that class or
2 should we just finish him on another occasion?

3 CHIEF JUDGE SLEDGE: Thank you.
4 And I'd encourage people to be thinking of
5 that as we move on into the next session.

6 MR. SMITH: Thank you.

7 CHIEF JUDGE SLEDGE: We'll recess
8 for 10 minutes.

9 (Whereupon, at 3:42 p.m. a recess
10 until 3:57 p.m.)

11 CHIEF JUDGE SLEDGE: We'll come to
12 order.

13 BY MR. STEINTHAL:

14 Q Let's move to a different topic,
15 Professor.

16 A Okay.

17 Q Just have some questions about
18 some of your revenue assumptions, okay?

19 For purposes of nonsubscriptual
20 webcasting you testified that there were
21 essentially four categories of advertising
22 that you use to project advertising revenues,

1 correct?

2 A Yes. There are many more
3 categories of advertising, but I focused on
4 four of them. That's correct.

5 Q And they were in stream audio ads,
6 right?

7 A Yes.

8 Q And that's while I'm listening to
9 the radio like a commercial radio, there'll be
10 an advertisement for something that is audible
11 to me because it's within the stream, correct?

12 A That's exactly right.

13 Q And then there's what you call
14 video gateway ads which are the visual ads
15 that can be seen by the listener if the
16 listener is looking at the screen before you
17 access your radio stream?

18 A They're audio and visual.

19 Q Meaning that they're visual and
20 it's like a TV ad?

21 A Yes.

22 Q Okay. And then you had a category

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1 called banner advertising?

2 A Yes.

3 Q And that's a visual component, is
4 it not, that appears on the screen of the
5 computer or device that you're accessing the
6 radio?

7 A That's correct.

8 Q And then there's sponsorship,
9 which is when somebody basically pays a
10 webcaster to take out advertisements and
11 basically have announcement that this
12 broadcast is brought to you by so-and-so?

13 A That's not exactly right. They
14 basically take over the site. They have
15 announcements. They have ads, you know. They
16 enter ads around it. Basically all the ads
17 are sort of coordinated around one sponsor in
18 all those and possibly other categories.

19 In practice what often happens is
20 they have Java ads and other sort of different
21 ways of getting at the viewer and the listener
22 they describe more into the testimony.

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1 Q But those are the four categories
2 of advertising that you use for your modeling,
3 correct?

4 A Yes. To be conservative I just
5 focused on those four.

6 Q Let's focus first on the in stream
7 audio ads for a minute.

8 A Okay.

9 Q Your model assumes a \$10 CPM, does
10 it not, for that?

11 A Yes, it does.

12 Q And what was the course you relied
13 on for that \$10 CPM?

14 A Well, I looked at a variety of
15 sources, AccuStream being one. I also looked
16 at Live365. I looked at AccuRadio. And as I
17 explained earlier, you really can't look at
18 any one of the components in isolation.
19 There's the chart -- the CPM, the price, the
20 inventory and the percentage you see through.
21 So I chose the collection of three that gave
22 the lower value for the total revenue per

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1 listener hour. And that set of three came from
2 AccuStream.

3 Q Okay. So in fact if you wanted to
4 get the specification citation for your
5 numbers, we would look at your advertising tab
6 in your report and line-by-line under "Notes
7 and Sources." For each line there's an entry
8 that describes what data you used to support
9 it, right?

10 A That would be the approximate
11 source for a particular number. But I think
12 it's very important to understand, as I just
13 explained, I looked at a variety of different
14 numbers and a variety of different sources to
15 make -- to come up with my estimate for each
16 of those categories.

17 Q So just again if I'm reading this
18 right, under the revenue line for your
19 advertising tab where it says in 2005 and 2006
20 CPM of 10 on line 2, if I go to -- note to on
21 your advertising tab it says AccuStream 2005
22 SoundExchange Exhibit 205DP as the source. And

1 then you go on further and say in addition and
2 you cite some rate card information that you
3 believed was corroborative, correct?

4 A Yes. Some additional information
5 from other sources. That's correct.

6 Q All right. Okay. Now, in fact
7 you've come into contact, have you not, with
8 information about the actual in stream CPMs of
9 each of AOL, Yahoo and Live365, correct?

10 A Certainly in general I'm familiar
11 with the actual CPMs. I can't testify right
12 now to each of those particular ones and CPMs,
13 but I think that's basically correct.

14 Q You've learned in discovery, have
15 you not --

16 MR. STEINTHAL: I'm going to ask
17 that this be put on the restricted record.
18 But looking at who is in this room, Garry, you
19 can stay as long as you agree to be bound by
20 the protective order.

21 MR. GREENSTEIN: I agree.

22 MR. STEINTHAL: I'm happy not to

1 clear the room, Your Honor, but like the
2 actual written transcript to be marked as
3 restricted when we talk about some of these
4 specific numbers that were produced on a
5 restricted basis.

6 CHIEF JUDGE SLEDGE: As we have in
7 each instance when you're asked to exclude the
8 public, you'll be very specific as to what
9 testimony they will be excluded from?

10 MR. STEINTHAL: I will. All
11 right. Starting with this question --

12 CHIEF JUDGE SLEDGE: Well, now, I
13 haven't granted your motion yet. Before I
14 grant your motion, you'll have to be specific
15 --

16 MR. STEINTHAL: Okay.

17 CHIEF JUDGE SLEDGE: -- as to what
18 testimony you expect to elicit to which the
19 public cannot hear?

20 MR. STEINTHAL: I was going to
21 quote specific information produced in
22 discovery by AOL, Yahoo and Live365 as to what

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1 their actual in stream audio CPMs are and ask
2 the witness whether he's familiar with them
3 and talk about the implications of that data.

4 CHIEF JUDGE SLEDGE: That was
5 Yahoo and AOL?

6 MR. STEINTHAL: And Live365.

7 CHIEF JUDGE SLEDGE: Anything
8 else?

9 MR. STEINTHAL: That's it for now.

10 CHIEF JUDGE SLEDGE: All right.
11 Any response to this motion to apply the
12 protective order to questions relating to
13 Yahoo, AOL and Live365 in stream advertising
14 revenues? Hearing no objection, the motion is
15 granted.

16 (Whereupon, portion of testimony
17 placed under Protective Order)
18
19

1 MR. STEINTHAL: We can go back on
2 the public record.

3 BY MR. STEINTHAL:

4 Q So when we talk about facts coming
5 to your attention, again discovery in relation
6 to your model at least with respect to this
7 category of information, the facts coming to
8 your attention reflected that the revenues
9 were much lower, a third or even less than the
10 number you used for your revenue projections,
11 correct?

12 A No, that's not correct.

13 Q Is it or is it not correct that
14 the CPMs that each of those companies
15 experienced based on the discovery turns out
16 to be less than one-third of the CPMs that you
17 used for in stream ad advertising?

18 A Yes, I think that may well be
19 correct.

20 Q Thank you.

21 Now I believe the AccuStream
22 report that you cited reports CPMs in a range

1 of between \$7 and \$20 for in stream audio, is
2 that right?

3 A As I recall, it reported a CPM of
4 \$10. I'm not -- I don't recall -- I don't know
5 which exact part you're referring to.

6 Q I think we previously marked
7 excerpts of the AccuStream report for you to
8 look at. Do you have it in front of you? If
9 you would look at --

10 A Is it this one?

11 Q Yes. Page SX6500. There's a list
12 of bullets.

13 A 500 doesn't seem to exist.

14 Q Excuse me?

15 A Is that between 6497 and 6512?

16 Q Let me get excerpts of what we
17 previously marked as Services Exhibit 30.

18 CHIEF JUDGE SLEDGE: Is this a
19 duplication of Exhibit 29?

20 MR. STEINTHAL: I believe, Your
21 Honor, it's a different excerpt. It's a page
22 that was missing.

1 BY MR. STEINTHAL:

2 Q Looking at page 3500 does this
3 refresh your recollection that in fact
4 AccuStream said in the quote in the middle of
5 the page "CPMs for Internet radio range from
6 \$7 to \$20 and still out rates have been
7 relatively the past two years." You see that?

8 A Yes, I don't -- I'm not sure this
9 is the page that I refer to in my document.
10 I have to say right now there are a lot of
11 numbers that -- so I don't know that was the
12 specific reference that I had in mind.

13 Q All right. So you acknowledge
14 that says 7 to 20, but you think it says \$10
15 somewhere else and that's what you relied on,
16 right?

17 A Yes.

18 Q Okay. Now let me show you from
19 the same report and to avoid there being any
20 issue about whether it's in or not, the
21 excerpt, I'll give you another one to look at
22 hot off the presses. Literally hot.

1 The same report --

2 CHIEF JUDGE SLEDGE: Mr.

3 Steinthal, these are not marked.

4 MR. STEINTHAL: This is all part
5 of the exhibit, Your Honor, which is, it's
6 our understanding, Exhibit 205DP. We have
7 marked excerpts as Services Exhibit 30. And
8 what I would propose is --

9 CHIEF JUDGE SLEDGE: This exhibit
10 is not marked.

11 MR. STEINTHAL: We'll mark this
12 excerpt as Services Exhibit 31, Your Honor.

13 (Whereupon, the document
14 was marked as Services
15 Exhibit 31 for
16 identification.)

17 CHIEF JUDGE SLEDGE: Neither is
18 the last exhibit you had was not marked.

19 MR. STEINTHAL: We'll call that
20 Exhibit 30A if that's all right, Your Honor.

21 CHIEF JUDGE SLEDGE: So what's
22 this, 30? And the other was 30A.

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1 MR. STEINTHAL: Yes.

2 (Whereupon, the document
3 was marked as Services
4 Exhibit 32 for
5 identification.)

6 MR. STEINTHAL: I apologize, Your
7 Honor, for --

8 JUDGE WISNIEWSKI: Could you tell
9 me what 30 was?

10 MR. STEINTHAL: 30 was the
11 original excerpt from the same document, Your
12 Honor.

13 JUDGE WISNIEWSKI: The one that we
14 have labeled as 29 here?

15 MR. STEINTHAL: Yes.

16 JUDGE WISNIEWSKI: What should be
17 29 then? 30 is the interrogatories is what I
18 had.

19 MR. STEINTHAL: 29 is the excerpt
20 from the AccuStream. And 30 is AOL.

21 So I will mark as Exhibit 31 the
22 short excerpt, Your Honor, that we just passed

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1 out a couple of minutes ago on 32. The bigger
2 excerpt from the same document, which is the
3 AccuStream report marked as 205DP

4 JUDGE WISNIEWSKI: Thank you.

5 BY MR. STEINTHAL:

6 Q If I may, Professor, it's correct
7 is it not that Accustream at the same time
8 reports that Yahoo was getting a CPM for in
9 stream audio of \$3 or \$4 if you look at page
10 SX6714?

11 A Well, I found the place that
12 actually has the numbers I referred to. It
13 wasn't what you said. It's actually on page
14 6514. That's where they give their summary
15 numbers, and it's exactly what I have in my
16 report. So that's, I guess, for the record we
17 should note that.

18 Q So it's that portion where they
19 refer to a \$10 CPM?

20 A Yes.

21 Q Okay. Take a look if you will at
22 page 6714.

1 A 6714. Okay. Just to clarify, I
2 mean I've got the full report here.

3 Q Okay.

4 A I assume that the page numbers are
5 the same. The full is an exhibit, right?

6 Q Yes.

7 A All right. Okay.

8 Q See where it says under CPMs?

9 A Near the bottom?

10 Q Yes.

11 A Yes.

12 Q Radio is anywhere from \$3 to \$4?

13 A Yes, I do.

14 Q And that relates to Yahoo, it
15 talks about Yahoo being enthusiastic, do you
16 see that?

17 A Yes, I do.

18 Q Okay. So the same report that
19 reports the CPM of \$10 generally then reports
20 a CPM for Yahoo of \$3 to \$4, is that right?

21 A Apparently, yes.

22 Q Did you do anything to try to

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1 reconcile the differences between the report's
2 passages that refer to a \$3 to \$4 CPM for
3 Yahoo and the \$10 CPM that you chose to use?

4 A Yes, I did.

5 Q What did you do?

6 A Well, as I explained in the report
7 in some detail and again I guess it was
8 yesterday and today, taking CPM in isolation
9 isn't particularly meaningful. You have to
10 look at the combination of CPM, inventory and
11 availability. You multiple those three
12 together to give you a revenue per listener
13 hour. Companies have a lot of discretion in
14 moving those numbers around to give you the
15 same net bottom line. You can either give a
16 lot of free ads away which lowers the effect
17 of CPM, they can claim to have a smaller
18 inventory, they have a higher seller rate, et
19 cetera.

20 So the way to reconcile these
21 kinds of numbers is to consider that generally
22 when people report higher CPMs they tend to

1 report fewer -- a lower inventory and a lower
2 sell out rate. If you multiple the three of
3 them together, you actually get much more
4 consistent numbers. As I describe in the
5 report when you look at the three sets of
6 numbers that I had -- when I had all three
7 sets of numbers so I could do that, Live365
8 when you're multiplying together gives a
9 considerably higher net revenue than the
10 AccuStream set of three that I used. So I
11 chose the one that gave a somewhat lower one.

12 That said, I'm happy to note that
13 upon discovery I found that on average a
14 streaming audio advertising did not generate
15 as much revenue per listener hour for most of
16 2005 as my model, but it would -- until the
17 very end and then in 2006 it actually shoots
18 past it. And that's what I said in the direct
19 already. That that was one of the components
20 that actually came in under.

21 Q Now the same report that you're
22 talking about reports on page 6714, does it

1 not, that inventory sell out remains
2 relatively low between 20 and 30 percent, is
3 that right?

4 A Well, there you go. I mean so for
5 the one that had the high CPM had a low
6 inventory seller, right? That was the one
7 with the \$10 CPM. So that's my point.

8 Q What's the number you used as your
9 inventory sell out rate?

10 A So the numbers I used were \$10 for
11 the CPM, 28 percent for the sell out rate and
12 5 for the number of available ads.

13 Q So you went in the higher range of
14 the reported 20 to 30 percent in AccuStream
15 for your inventory rate, right?

16 A No. I used the exact precise
17 numbers. These don't have ranges. These are
18 the exact numbers that they report on 6514.
19 There were no ranges.

20 Q So you're using their forecast of
21 28 percent, which is in the higher part of the
22 range? They also give in the same report

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1 between 20 and 30 percent, right?

2 A I used these exact numbers that
3 are -- that they gave for their forecast.

4 Q For AccuStream?

5 A Straight. Because I mentioned I
6 compared them to some other sources and
7 compared how those three numbers compared to
8 other sources.

9 Q But when you talk about that,
10 straight from AccuStream, your words, average
11 CPM \$10?

12 A Yes.

13 Q Did you ever see any underlying
14 documentation of how they got to that average
15 if they're reporting that Yahoo is 3 to 4?
16 Did you see any of the other numbers they
17 actually used by webcaster so that they could
18 calculate a \$10 average CPM?

19 A I saw CPMs from a variety of
20 different sources and many of them are listed
21 as higher, because AccuRadio listed a higher
22 CPM. I've seen sell out rates and I've seen

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1 inventory. So this was one of the numbers
2 that was consistent with the other numbers
3 that I saw.

4 Q Professor, in the AccuStream
5 report do you recall ever seeing a list of
6 inputs that were averaged together at 10? Yes
7 or no.

8 A I used this as a report of the
9 CPMs just as I've used the other numbers as
10 inputs.

11 Q So the answer is you don't recall
12 seeing a list of inputs that averaged together
13 at 10, right?

14 A Within the AccuStream report?

15 Q Yes.

16 A No.

17 Q Okay. But you do recall seeing
18 within the AccuStream report that Yahoo was
19 reported at between 3 and 4?

20 A Yes, I do.

21 Q Okay. And you can't as you sit
22 here today tell us what webcasters would have

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1 had averages for actual in stream CPMs
2 sufficiently above 10 to get from a Yahoo with
3 3 to 4 to an average of 10, right?

4 A There are a lot of webcasters that
5 claim to have higher CPMs on their public
6 website. So I can mention one of them,
7 AccuRadio. But, again, I don't think it's
8 meaningful to pick out one piece. You have to
9 look at the three of them together. I picked
10 a set of three that led to the lower total
11 amount. And the reason for that was that
12 others reported higher sell through rates
13 and/or higher inventories so they net out to
14 a higher -- a high rate.

15 This sell through rate only -- it
16 averages to about 1 per hour if you multiple -
17 - a little over one per hour, 1.4 per hour.
18 Twenty-eight percent times 5 availabilities
19 means that they're only playing a little bit
20 less than one per hour.

21 My experience was that webcasters
22 that I listened to played a lot more than one

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1 per hour. So in this case it seems they have
2 a lower -- lower numbers for some of the
3 values and higher numbers for other values.
4 But the set of three is really what I focused
5 on.

6 Q Right. I understand. But I'm
7 really trying to be precise about what you
8 relied upon and what you didn't. You relied
9 upon the \$10 CPM for this purpose, right --

10 A Not in isolation. I did not rely
11 on the \$10 CPM per se, I relied on that set of
12 three numbers because that's what I thought
13 was the relative input into my model.

14 Q Right. You would agree with me
15 that if one number was too high and the other
16 were, all things being equal, the right
17 numbers that would throw this off and yield a
18 higher revenue number than is warranted,
19 right? That's a simple matter of math, right?

20 A Hypothetically, yes.

21 Q Okay. And let's assume for the
22 sake of the argument all three of your numbers

1 that you used are higher than actuality in
2 2006. Then clearly your model would be off,
3 right?

4 A Not necessarily.

5 Q Well, wait a minute. If you
6 multiple three numbers together and they're
7 all larger than reality, you're going to get
8 a larger number?

9 A For that component. But what
10 matters is the total revenue that you earn per
11 listener hour. So just as you could have less
12 revenue from audio, more sponsorships, more --
13 you know you can balance these out. So the
14 model will be accurate as long as the bottom
15 line is consistent with what actually
16 happened. It's not terribly sensitive if one
17 piece of it overshoots, another piece
18 undershoots. And, in fact, as I've said, it
19 turned out when we looked at the actual data
20 that the model was placed in with the total
21 revenue per listener hour, in fact a little
22 bit less than what we had calculated from the

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1 discovery documents.

2 Q Now you also take as a starting
3 point for your banner ad calculation CPMs
4 estimated at \$3, correct, in 2005 and it's on
5 your advertising tab?

6 A Yes, that's correct.

7 Q And you're familiar with the
8 testimony, you may not agree with it, but
9 you're familiar with the testimony of Mr.
10 Roback and Ronning & Lipset that banner ads
11 are difficult to sell for Internet radio
12 because of the visual nature of those ads
13 relative to the audio experience of radio?

14 A I believe he specializes in
15 selling in stream audio ads, not banner ads.
16 In some sense, that's an alternative to what
17 he sells.

18 Q You are familiar with the
19 testimony, are you not, that banner ads are
20 difficult to sell for radio because radio is
21 an audio medium and there's a concern among
22 advertisers that people are not actually

1 viewing the screen?

2 A That's what he says.

3 Q And you just don't agree with
4 that, right?

5 A Well, we can look at what the data
6 say.

7 Q Doesn't the data reflect a lower
8 CPM than the \$3 CPM that you used for your
9 model?

10 A The data reflects that when I
11 looked at the actual discovery, a large
12 webcaster was actually earning substantially
13 more from banner ads than what I had
14 originally estimated in my model.

15 Does someone have a pen I could
16 borrow? Thank you.

17 Q Are you familiar with the
18 testimony of both AOL and Live365 that their
19 banner advertising was between \$1 and \$2 CPM?

20 A I don't recall that.

21 Q And I believe you have in your
22 report a 2005 forecast of inventory per

1 listener hour of .6, isn't that correct?

2 A Are you referring to video gateway
3 ads?

4 Q Yes.

5 A Yes, that's correct.

6 Q Now am I reading it wrong or does
7 AccuStream forecast an inventory per listener
8 hour of .35?

9 A You have to show me what you're
10 referring to.

11 Q On page 6514.

12 A So what was the question.

13 Q The question was whether
14 AccuStream reported inventory per listener
15 hour of gateway ads of .35 rather than the .61
16 figure that was in your report?

17 A I don't see that. I'm sorry. On
18 page 6514?

19 Q Yes. On page 6514 of the report.

20 A Could you just point it out to me?
21 Maybe I'm not --

22 Q Yes.

1 A I don't see that.

2 Q Okay. Actually, it's easier to
3 use your written direct testimony for this on
4 page 24.

5 A Okay.

6 Q See in the third full paragraph on
7 that page it says: "AccuStream estimates that
8 in 2005 webcasters played 35 video gateways
9 for every 100 listener hours of .35 per
10 listener hour?

11 A Yes.

12 Q That's a lot lower than the .6
13 that you used for your model, correct?

14 A Well, as I note in the testimony,
15 it's not clear whether they're referring to
16 people who -- including people who don't even
17 run video preroll ads and some webcasters do
18 that. So it seemed to me the relevant ratio is
19 including people who do run video gateway ads
20 what their inventory is and not averaging out
21 with people who don't run them at all.

22 Q But you're also assuming a 90

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1 percent sell through for video prerolls,
2 aren't you?

3 A Yes, I am.

4 Q So how do you assume a 90 percent
5 sell through among the webcasters when at the
6 same time you just said that you wanted to
7 make an adjustment to go from .35 to .6 to
8 account for those that don't run video
9 prerolls?

10 A Well, in my analysis I'm looking
11 at a profit maximizing webcaster, not one that
12 is choosing not to run ads that they could be
13 running perhaps for some other reason. So I
14 wanted to look at the estimate for a company
15 that's maximizing the current profits.

16 Q So your assumption is that Yahoo
17 and AOL are not maximizing current profits
18 when they testify that the reason they're not
19 running video gateways is because there's no
20 demand for it on an audio product, right?

21 MR. SMITH: Your Honor, I object
22 to this kind of question where he

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1 characterizes testimony from somebody who
2 hasn't been before this Court, some deposition
3 without giving us any indication where it is.
4 This witness is being cross examined by
5 Steinthal's characterization of what some
6 deponent said. And there's no way that the
7 witness can respond to that. There's no way I
8 can check it to find out whether he's
9 accurately characterized the testimony. It's
10 just improper.

11 CHIEF JUDGE SLEDGE: Mr.
12 Steinthal?

13 MR. STEINTHAL: On this subject I
14 believe the witness has already acknowledged
15 that AOL and Yahoo have testified in
16 depositions he's read as to why they are not
17 running video gateways and that he's read the
18 Ronning & Lipset statement as well where it
19 talks about video gateways and why they're not
20 being run. I believe his testimony previously
21 was that his expert opinion was that they
22 should run them differently.

1 CHIEF JUDGE SLEDGE: I thought his
2 testimony was that they were making a decision
3 to defer revenue for various reasons including
4 audience building that was available to them.

5 MR. STEINTHAL: I believe, Your
6 Honor, that is one of the things he testified
7 to contrary to what the testimony is on the
8 other side. That's his opinion. And I believe
9 I've elicited from him already that he is
10 familiar with the contrary statements made by
11 representatives of AOL and Yahoo and Ronning
12 & Lipset that the reason they're not selling
13 video gateway ads is because there's no demand
14 for them.

15 CHIEF JUDGE SLEDGE: The objection
16 is sustained to the extent please rephrase
17 your question to make specific references to
18 which you may consider in answering the
19 question.

20 BY MR. STEINTHAL:

21 Q Well, let me put it to you this
22 way, sir.

1 A Sure.

2 Q You chose the .6 figure for
3 inventory for per listener hour over the .35
4 figure that's set forth in AccuStream,
5 correct, for the reasons you identified?

6 A Yes, that's correct.

7 Q And one of those assumptions
8 underlying your decision to do that was the
9 assumption that there would be substantial
10 sell through of video gateway ads, correct, on
11 webcasters?

12 A That actually didn't come into the
13 inventory calculation. That came into the sell
14 through percentage calculation.

15 Q And then perhaps I'm not
16 understanding. Then what specific assumptions
17 you made to justify taking the .35 inventory
18 per hour figure set forth in the AccuStream
19 report and boosting it up to .6?

20 A Well, it's described in some
21 detail in the testimony here. But the essence
22 of it was that I wanted to understand how many

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1 video prerolls were available, what the
2 availability was. That's what that inventory
3 means. And that's going to be a function of
4 how many streams gets started per hour.

5 For instance, if the average
6 person listened for exactly one hour, then
7 there would be on average one gateway
8 available per hour. If people listened on an
9 average half an hour, then there would be on
10 average 2 gateways available per hour.

11 And so what you need to do is
12 estimate how long people listened on average.
13 I had data on how long people listened on
14 average and I used that data to estimate the
15 .65. That would give you the available
16 inventory, the number of times if you wanted
17 to, you could run a gateway ad.

18 Now there is the possibility that
19 you could run more than one gateway ad. You
20 know, when you got to a movie theater you see
21 multiple gateway ads. But I just assumed
22 you'd only run one per start up.

1 Q And so it's clear you're using the
2 90 percent sell out rate because you believe
3 that's what it should be, not what it
4 currently is?

5 A I didn't say anything about that.
6 I was talking about the inventory just now,
7 not the sell out rate.

8 Q Well, but you mentioned the sell
9 out, so now I'm going to the sell out.

10 A Okay.

11 Q You testified that you understand
12 that AOL and Yahoo don't sell video gateways,
13 right?

14 A That's my understanding for Yahoo.
15 I haven't verified that recently for AOL.

16 Q But you're looking at what you
17 think the market should be as opposed to what
18 the market is when it comes to that 90 percent
19 sell through, right?

20 A No. As I said yesterday, and I
21 said a number of times, I think it could be a
22 very rational decision to you know hold off

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1 making some money now in order to build
2 audience for the future. I'm not saying that
3 they should be doing -- I think it's perfectly
4 fine for them to decide not to maximize their
5 current revenues if that's what they want to
6 do if they feel they can make more money some
7 other way or that the value will build. That's
8 standard in the Internet industry. It's all --
9 you know, a lot of companies work very
10 aggressively to build scale.

11 I mean I've met with the executive
12 at Amazon, for instance, where they spend a
13 lot of time talking about how they should
14 forego current profits today by having prices
15 artificially low in order to build market
16 share for the future. And that appears to
17 what's going on exactly in this industry.
18 They're foregoing some current profits now in
19 order to build profits for the future.

20 I'm not saying they should or
21 shouldn't do that. I'm just saying that if
22 they wanted to, they could earn these profits

1 currently. And if a willing buyer and a
2 willing seller would take that into account.
3 A willing seller would not say "Hey, I see that
4 you're deciding not to maximize profits, let
5 me pitch in on that." They would say "Look,
6 you know, here is what this is worth to you.
7 This is what the revenues would be."

8 So that's what I've said. You keep
9 mischaracterizing it and I'm just going to
10 keep clarifying it if you keep
11 mischaracterizing.

12 Q With all due respect, I'm not
13 mischaracterizing anything. You have
14 testified that you expect in your model a 90
15 percent sell through for video gateway,
16 correct? Yes?

17 A Yes.

18 Q And you've acknowledge that at
19 least Yahoo does not sell video gateways,
20 right?

21 A That's a function of their
22 inventory, not their sell through.

1 Q Please, sir, please. You've
2 acknowledged, have you not, that you know that
3 Yahoo does not sell video gateways for
4 Internet audio?

5 A They offer none, yes.

6 Q Excuse me?

7 A They don't offer any. Yes.

8 Q All right. So they're not selling
9 them?

10 A Their inventory is zero. That's
11 what they've chosen, yes.

12 Q And their sell through rate is
13 zero?

14 A The sell through --

15 Q If you're looking on this on an
16 industry wide basis --

17 A Sell through is number sold
18 divided by the available inventory.

19 Q Oh, so I see. So that should we
20 look at this 90 percent number for sell
21 through, not as an industry wide number but
22 just as a number that effects those webcasters

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1 that actually sell video gateways?

2 A Yes, that's correct.

3 Q So then your 90 percent number is
4 not meant to be a suggestion to the panel that
5 there is an industry basis a 90 percent sell
6 through of videos?

7 A It's meant to reflect what a
8 profit maximized, as I describe in my
9 testimony, what a profit maximizing --
10 maximizing current profits webcaster would do
11 of sufficient scale to be economically viable.

12 Q One more thing on video gateways.
13 You use a \$20 CPM and AccuStream on this same
14 page we were looking at has a \$15 CPM, right?

15 A Yes. I believe that's the case.
16 Actually, I don't -- let me look at the page
17 you're referring to just to make sure. What
18 page is that?

19 Q Page 6514.

20 A Yes, that's correct.

21 Q Now model 2, as we talked about
22 before, is based on projecting from the

1 figures for costs and revenues that you used
2 for model 1, right?

3 A That's not exactly right. They
4 both draw on a common basis of our estimates
5 and then we basically plugged them into model
6 1 and plugged common model 2.

7 Q A key driver of model 2 is your
8 projections of revenues, is it not?

9 A Yes, it is.

10 Q And it's true, is it not, that the
11 revenue figures you started from insofar as
12 they're based on the AccuStream report are
13 themselves projections of revenues associated
14 with 2005 and 2006?

15 A Portions of them are, yes.

16 Q Well, isn't the reality that all
17 of the figures for revenues contained in the
18 AccuStream report for 2005 and 2006 are
19 projected revenues for 2005 and 2006?

20 A They come from a variety of
21 different sources, but when we did get on
22 discovery the actual numbers, it turned out

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1 that they were accurate.

2 Q Please, bear with me. The
3 Accustream reports for 2005 and 2006 do not
4 purport to be actual numbers, do they? They
5 purport to be projections of revenues for 2005
6 and 2006?

7 A The AccuStream numbers for CPM,
8 inventory and sell through for several
9 categories are forecasts; that's correct.

10 Q And the aggregate tuning hours
11 chart that works its way through your
12 calculations for purposes of averages per
13 hour, that's on page 11, correct?

14 A Yes. That data isn't generally
15 used in my estimates because I calculated
16 everything per listener hour. So, for
17 instance, when you report the inventory per
18 listener hour, you've already got it per hour.
19 You don't need to look at the aggregate tuning
20 hours at all.

21 Q So you don't rely on the chart on
22 page 11 at all?

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1 A The purpose of the chart was to
2 show the rapid growth in the industry.

3 Q And that's taken from AccuStream,
4 correct? Straight from AccuStream?

5 A Yes, it was.

6 Q Do you have any basis as you're
7 sitting here to tell us what portion of the
8 webcasting reflected on the chart on page 11
9 is statutory webcasting and what portion of it
10 is nonstatutory webcasting?

11 A I don't know as I'm sitting here.
12 The purpose was -- it's not an input into the
13 model. It's just to give a sense of a general
14 goal for the industry.

15 Q So the answer is you don't know
16 one way or the other on that issue?

17 A Well, there is data where we
18 calculate aggregate tuning hours in Appendix
19 A.

20 Q Well, my question is breaking it
21 down between webcasting under the statutory
22 license and Internet radio is not compliant

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1 with the statutory license; do you have any
2 basis to testify as to what portion of the
3 stream hours reflected on page 11 is under the
4 statutory license and what is not?

5 A If you look at the average tuning
6 hours tab, then it lists the webcasters -- the
7 tuning hours from webcast matrix. And it
8 lists each of the different parties involved
9 in webcasting.

10 Q And as you sit here today do you
11 know which portion of those webcasters are
12 streaming under the statutory license and
13 which are not?

14 A Well, it refers to the top 20
15 webcasters. So my interpretation would be all
16 of them.

17 Q Are you familiar with the fact
18 that Yahoo, for example, operates a webcasting
19 services that some of the sound recording
20 companies treat as outside of the context
21 statutory license?

22 A Yes, I am familiar with that.

1 Q But you don't know how many of the
2 hours on that chart, just speaking of Yahoo as
3 an example, are under the statutory license
4 and what not?

5 A No, I don't.

6 Q Now you used the 40 hour per month
7 usage rate in your model 2 for subscription
8 services, did you not?

9 A Yes, I did.

10 Q That does relate to your
11 calculations per hour, doesn't it?

12 A Yes, that does.

13 Q Because the higher number of
14 hours, the lower the average, right?

15 A Exactly right.

16 Q Now I think you testified that you
17 had no number to start with so you assumed you
18 to accurately use the nonsubscription
19 webcasting hours of Live365 as a starting
20 point, right?

21 A Yes.

22 Q So you took the average as you

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1 understood it of nonsubscription average
2 monthly listening on Live365 nonsubscription
3 and then you multiplied it as I remember your
4 testimony by a number between 3 and 5 based on
5 the assumption in the AccuStream report that
6 subscription listener were estimated to listen
7 3 to 5 times more per month than
8 nonsubscription listeners, is that right?

9 A That's exactly right.

10 Q And again, you don't know the
11 source of AccuStream's 3 to 5, do you?

12 A No, I don't.

13 Q And you've also assumed that a
14 large webcaster would grow its aggregate
15 tuning hours over the course of 2006 to 2010
16 by 25 percent annually, correct?

17 A Yes, that's correct.

18 Q Ad you say that's a reasonable
19 assumption, again, a reliance on AccuStream,
20 correct?

21 A Well, if you look at the
22 historical data they grew faster than that, so

1 it's assuming a slower rate of growth in the
2 future.

3 Q Doesn't in this respect the chart
4 on page 11 have some relevance?

5 A It doesn't really have relevance
6 to the revenue per tuning hour or doesn't
7 really effect much the main cost, which is the
8 bandwidth cost which are totally proportional
9 to hours and as you get bigger or smaller,
10 those costs -- the one place it would have a
11 small effect on is the fixed costs. But if
12 you look at the fixed costs half, the fixed
13 costs grow quite rapidly with those as well.
14 So it doesn't have a terribly significant
15 effect. I mean, if you were to -- most of the
16 inputs would be completely unaffected and the
17 one that's the smallest would be effected in
18 a very small way.

19 Q Let me go because I'm not sure you
20 answered my question. But you said that you
21 rely on AccuStream for the proposition that
22 you expected growth to be 25 percent per year

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1 in aggregate tuning hours. And that what
2 AccuStream had -- you're shaking your head no?

3 A That's what you said. What I said
4 was that the historical rate of growth had
5 been somewhat slower than that, and I used
6 that as well in my consideration of fact that
7 the growth was going to be conservatively 25
8 percent a year.

9 Q Did you or did you not testify
10 that you relied on AccuStream for the
11 projection that ATH would grow 25 percent
12 annually?

13 MR. SMITH: He did not so testify,
14 Your Honor. I object to the question.

15 CHIEF JUDGE SLEDGE: Mr.
16 Steintal?

17 MR. STEINTHAL: It's a simple
18 question.

19 THE WITNESS: Not to my
20 recollection. I testified what I just
21 testified to.

22 BY MR. STEINTHAL:

1 Q Do you have any sources for your
2 projection of 25 percent growth in ATH year-
3 to-year other than AccuStream?

4 A As I mentioned, that also reflects
5 my looking at the historical growth rate and
6 the fact that it -- back to that going slower
7 and I read dozens of industry analyst reports
8 and other projections that had similar
9 optimistic projections for the growth of this.
10 I know that some of the webcasters projected
11 that over-the-air that webcasting would
12 replace over-the-air radio as a source for
13 music. So I used all of those, factored all
14 of those in and I used my expert judgment to
15 weight them when I came up with those numbers.

16 Q It wasn't meant to be
17 controversial. Did you rely for the historical
18 growth in webcasting in part on the chart on
19 page 11?

20 A Yes.

21 Q Did you try to factor in in
22 relying on that chart on page 11 your lack of

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1 knowledge as to how much of that growth was in
2 statutory license webcasting versus
3 nonstatutory license webcasting?

4 A I didn't think that would be
5 material.

6 Q How, you agree with me that the
7 AccuStream projection of growth in aggregate
8 tuning hours was made at a time when the
9 royalty for sound recordings was under the
10 prior rate of 1.17 cents an hour, right?

11 A Yes.

12 Q So AccuStream didn't conduct a
13 projection of anticipated growth in aggregate
14 tuning hours under a scenario where webcasters
15 would have to pay more than three times the
16 royalty rates associated with sound recordings
17 than the ones they were paying when they made
18 the projects, correct?

19 A I think that everybody knew that
20 these rates were up for negotiation and they
21 would be set based on what a willing buyer and
22 seller would choose. So the proper thing to

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1 do would have been to think about what -- you
2 know, take into consideration that there's
3 going to be an update in the rate. Beyond
4 that I don't know the details of what weight
5 they gave it to those sorts of factors. But
6 I think that the -- it's not terribly material
7 to any of the estimates in my calculation
8 anyway.

9 Q Well, you don't dispute, do you,
10 that someone projecting potential growth in a
11 business would want to take into consideration
12 what effect tripling the largest single cost
13 that that industry has would have on potential
14 growth?

15 A They may well take that into
16 account, yes.

17 Q Would you if you were trying to
18 project growth in activity of an industry,
19 wouldn't it effect your projections if
20 somebody told you by the way when you're
21 making those projections don't assume your
22 current cost structure? Assume that your

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1 single largest cost, which is currently 25 to
2 40 percent or more of revenues was tripled;
3 don't you think that would effect projections
4 as to future growth?

5 A You know, that's an interesting
6 question. Now that I think about it it's quite
7 possible that it wouldn't at all.

8 Q And it's quite possible that it
9 would?

10 A The more I think about it, it
11 probably wouldn't have a big effect. I mean,
12 it doesn't really matter to my model, but
13 webcasting is free to the listeners. So we're
14 not talking about raising the price to the
15 listeners. So the same number of people would
16 want to listen to music regardless. The only
17 thing we're talking about is exactly what the
18 allocation of that surplus is between the
19 different parties that are providing it.

20 It's not clear to me that shifting
21 around the surplus between the providers of
22 the services is going to effect the demand for

1 the product to the end user given that they're
2 receiving it, by in large, for free.

3 Q Subscription services aren't free
4 to the listener, are they?

5 A No, they're not.

6 Q So that part of your testimony
7 you'd like to rethink, wouldn't you?

8 A Well, as I noted, the vast
9 majority of it is free webcasting, so that was
10 the part that I was referring to.

11 On the subscription side the
12 margins are on the order of 85 percent. So I
13 think that probably if those margins -- those
14 margins would still be quite large and I think
15 there would still be an incentive for
16 webcasters to drive business there. But to the
17 extent to which webcasters found it more
18 profitable to keep people over at the free
19 side as opposed to the subscription side, they
20 might take actions like changing the stick
21 wall.

22 For instance, Yahoo right now as a

1 stick wall where if people are listening to
2 three Internet broadcasts, they start
3 degrading the service to try to force them
4 over to the subscription side. It may be that
5 if the subscription side weren't quite as
6 profitable, they wouldn't degrade the services
7 early. They would let those people listen to
8 more hours without having it degraded.

9 So it's not a totally simple --
10 it's kind of an interesting intellectual
11 question to work through. I can imagine
12 different scenarios for exactly how the growth
13 of listener hours would proceed. It might be
14 kind of fun to do a little research paper on
15 it. But it's not something that has sort of a
16 first order effect of any of these numbers in
17 my calculations.

18 Q Is your testimony that a rational
19 business person would not take into
20 consideration a multiplication of his largest
21 cost by three into determining how and whether
22 he would grow his business?

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1 MR. SMITH: Asked and answered,
2 Your Honor.

3 CHIEF JUDGE SLEDGE: Overruled.

4 THE WITNESS: The demand for the
5 product is going to be a function of what his
6 -- the demand for the product is going to be
7 a function of what the price is to the end
8 user. As long as that remained free, demand
9 for the product isn't going to fundamentally
10 change. What's going to change is the
11 allocation between the different parties.
12 There might be more or less entry into the
13 industry, more or less rent dissipation. But
14 shifting around the surplus I don't think is
15 going to significantly effect the growth in
16 hours.

17 BY MR. STEINTHAL:

18 Q You talked about in economic
19 terms. I'm going to talk about it in real
20 terms. You say --

21 A None of this is real.

22 Q Okay. You're saying rent

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1 dissipation?

2 A Yes.

3 Q Meaning a consequence of raising
4 the rate by three is that, as you so
5 eloquently put it in rent dissipation terms,
6 some people may abandon their market. That's
7 their voluntary choice. If the costs get too
8 high for them, they can abandon the market,
9 right?

10 A That's correct.

11 Q And wouldn't lower the total
12 number of aggregate tuning hours if people are
13 being driven out of the business?

14 A No, it wouldn't.

15 Q For those webcasters it would. It
16 would go to zero, wouldn't it?

17 A Yes, it would.

18 Q Now, by the way, you volunteered
19 all this testimony about Yahoo and its stick
20 wall. I gather you got that from reading Mr.
21 Roback's deposition, didn't you?

22 A I read that part in particular.

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1 Q But your testimony today as you
2 sit here now is that you didn't read the part
3 of the deposition that related to Yahoo's
4 voluntary deals with Universal Music Group and
5 Warner Music Group?

6 A This is what I did. I read a large
7 number of documents. I read through them very
8 quickly to identify numbers that might be
9 relevant to this. I had my -- I asked
10 Professor Bakos to help me review a lot of
11 documents. And the ones that had numbers that
12 would be relevant that I thought would help us
13 make a determination, I read particularly
14 carefully. Regrettably, I can't remember
15 every page of every document that I have read.

16 MR. STEINTHAL: Should I read from
17 Mr. Roback's deposition or will counsel
18 stipulate that Mr. Roback testified about that
19 subject so we can save some time?

20 MR. SMITH: Well, I believe his
21 entire deposition is attached to the amended
22 report of Dr. Brynjolfsson. So it's in

1 evidence.

2 MR. STEINTHAL: It is so
3 stipulated that Mr. Roback's deposition is
4 already in evidence? I'm happy to move on. If
5 it's not, Your Honor, I'd reserve the
6 opportunity to put it into evidence with an
7 offer later if it turns out that Mr. Smith
8 happens to be wrong, if that's okay.

9 CHIEF JUDGE SLEDGE: And your
10 question is whether it is in fact attached to
11 the amended testimony?

12 MR. STEINTHAL: Yes. And Mr. Smith
13 has said that the full deposition of Mr.
14 Roback is appended to the witness'
15 supplemental statement. My only point was to
16 show that this subject was in part of Mr.
17 Roback's deposition. If the whole deposition
18 is already in evidence, I don't need to waste
19 the time of actually bringing his attention to
20 the pages, reading it and whatnot.

21 So if it's in evidence, I'm happy
22 to move on. If not, I'm even happy to move

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1 on and reserve the right to put the deposition
2 into evidence later if it turns that Mr. Smith
3 is in error. As long as he won't object to it
4 at that time and will represent to that now,
5 then I think we can move right along.

6 CHIEF JUDGE SLEDGE: I heard you
7 say you're ready to move on in either event.

8 MR. STEINTHAL: Well, I'll move on
9 and read in the deposition transcript if I
10 can't get a stipulation to that effect. If we
11 can get the stipulation to that effect, then
12 I'm happy to move to a different subject;
13 that's all. I just don't want to find out
14 later that I'm not allow to make reference to
15 Mr. Roback's deposition.

16 Is it in evidence?

17 MR. SMITH: Your Honor, I already
18 said what it is. It's in evidence.

19 MR. STEINTHAL: Fine.

20 MR. SMITH: Why are we having
21 extended colloquy about this? It's 4:55.

22 BY MR. STEINTHAL:

1 Q Now the validity of your model 2
2 depends on your ability to predict accurately
3 the cost and revenues during this time period,
4 correct, 2006 to 2010?

5 A Yes.

6 Q And if you under estimated the
7 costs, then obviously that would effect the
8 reliability of the model, right?

9 A Yes, it would.

10 Q And if you didn't accurately
11 project the revenues, the same result, right?

12 A Yes, it would.

13 Q Now, would you agree that
14 predicting revenues and costs for new
15 industries are more difficult than mature
16 industries? I think I may have asked you this
17 before.

18 A You did ask me it before, and I
19 said -- I'll say again that it's often more
20 difficult. Although in this particular
21 industry there are some things are remarkably
22 predictable. We're lucky that we can take

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1 advantage of those, specifically bandwidth.

2 Q Would you agree with the
3 proposition that webcasting is a very new
4 industry and one of the problems has been that
5 advertisers, potential advertisers aren't
6 always familiar with the advertising
7 opportunities?

8 A That's been one of the reasons
9 historically why advertising rates have been
10 late. And clearly that's something that's
11 changing.

12 Q So you'd agree with the
13 proposition that webcasting is a very new
14 industry that many players are trying to get
15 t know better in terms of how business is
16 conducted?

17 A It's not that new compared to a
18 lot of the other industries that I personally
19 look at, but it's relatively new compared to
20 most of the industries in the United States
21 economy.

22 Q Now Professor, if your model was

1 actually used in the marketplace by labels in
2 their negotiations, let me ask you what result
3 would happen under the following hypothesis.
4 Let's suppose a webcaster's costs fixed and
5 variable were a 100 --

6 A A 100 what?

7 Q A 100 units.

8 A Okay.

9 Q Okay. And let's assume that the
10 webcaster's revenues --

11 A Should I be writing this down?

12 Q It's pretty simple.

13 A Fixed amount. Okay.

14 Q The webcaster's revenues were 50.

15 A Webcaster's costs are 100 and the
16 webcaster's revenues are 50? Yes.

17 Q Right. So they're in a loss
18 position, okay?

19 A Yes.

20 Q Can you use your model to predict
21 what the price will be in a situation where
22 the entity seeking the license is in a loss

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1 position?

2 A It's going to depend on exactly
3 what numbers you're including in the revenue
4 in costs.

5 Q The same ones you did?

6 A To include the revenues in cost
7 that I'm including, those are fairly narrowly
8 defined, just revenues right from webcasting.
9 And if the companies were continuing to invest
10 in that situation and had made agreements
11 under those circumstances, that would be very
12 compelling evidence to me that there were some
13 other revenues that they were earning in other
14 parts of their business that were important.
15 It would prompt me to go and see if I could
16 identify those other benefits.

17 If there were no other such
18 revenues, which maybe is what you're
19 hypothesizing, then I would not expect them --
20 then this would not be a profitable industry,
21 then they should not be in business.

22 Q Well, you testified at one point

1 that it's not uncommon at all for businesses
2 to operate at a loss while they're building
3 for the future, correct?

4 A Well, there are two things that
5 might lead them to operate at an accounting
6 loss. And let me just broadly categorize them.

7 One is the fact that you may be
8 generating benefits in other parts of your
9 business and so even though you show an
10 accounting loss in a particular division, it
11 in fact has such important benefits to the
12 rest of your business. Some people have said
13 that GM's, General Motor's car operations are
14 at a loss but they're making money on GM's
15 financing side and that that's enough to make
16 it worthwhile. But in different organizations
17 you often will have that kind of a situation,
18 especially if they've got multiple parts.

19 The other possibility is that
20 you're showing an account loss but that
21 reflects what an economist would more properly
22 call an investment in the future. For

1 instance, if you forego revenues currently,
2 that shows up as in a loss, but conceptually
3 what you're really doing is investing a dollar
4 today in order to earn \$2 or \$3 in the future.
5 And that sense it's not an economic loss.
6 It's really just an accounting loss.

7 Q Well, let's assume we're in that
8 early period of an industry --

9 A Yes.

10 Q -- and I'm investing in technology
11 and other inputs that are necessary to build
12 a business.

13 A Yes.

14 Q And my amortized costs in the
15 investment are a part of my annual cost
16 structure. Indeed, it was on one of your
17 charts, right, the amortized investment costs
18 or the part of the costs that a given
19 webcaster would have?

20 A Are you talking about the fixed
21 costs, the equipments?

22 Q Well --

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1 A Yes.

2 Q Is it appropriate in your modeling
3 to look at that, you know like the interest
4 you pay on loans or depreciation, things like
5 that, associated with your balance sheet
6 because you're actually paying them in terms
7 of your annual costs?

8 A Well, if you really want to do
9 this right you have to make a distinction
10 between costs that are associated with
11 creating the current product versus costs that
12 are associated with future revenues. And the
13 costs that are associated with future revenues
14 properly you should of as being matched up
15 with those future revenues. They're
16 essentially an investment. And so when you do
17 the accounting you need to separate those two.

18 In practice often times business
19 don't fully make those distinctions. But
20 economically there is an important distinction
21 to be made there.

22 Q And for your modeling if you make

1 that distinction and focus on the present
2 costs being incurred rather than those
3 investments?

4 A So for my modeling I took the
5 conservative assumption that all of the costs
6 that we identify here were necessary to
7 generate their current revenues. If in
8 practice some of them were being incurred in
9 order to generate future revenues, we would
10 want to remove them from the cost side.

11 Q Now, again, in a hypothetical
12 situation where I'm a loss position after you
13 sort out the appropriate costs and revenues in
14 the identical categories that you considered
15 in your model, there's no surplus, right?

16 A If what you are hypothesizing is
17 that there true costs are greater than their
18 true revenues, that the costs of generating
19 those revenues today are greater than the
20 revenues they're generating today and there
21 are no future benefits, then they're in a true
22 economic loss position.

1 Q And your model doesn't work in
2 that situation, does it not?

3 A Well, my model would indicate that
4 there's no surplus and that no agreement would
5 be made and that -- yes.

6 Q Well in a statutory license
7 situation where some rate has to be set, your
8 model wouldn't work because there's no
9 surplus, right?

10 A Well, in that case even if the
11 model -- if the rate were set to be equal to
12 zero, the company would still choose not to
13 operate because there's a loss.

14 Q Now record companies don't really
15 use this model when they price their rights in
16 the actual marketplace, isn't that right?

17 A I believe that this is exactly how
18 business makes decisions. I've been on a
19 number of boards, I've taught hundreds perhaps
20 thousands of MBA students and this is exactly
21 the type of thing we do. We look at the
22 revenues and the costs and see whether or not

1 it's a profitable business, whether it's one
2 that's going to be a loss you shouldn't go
3 into or whether it's going to be profitable.
4 And then you see how much you can bargain for.
5 And a big part of, say, an MBA curriculum is
6 understanding the barriers to entry and the
7 bargaining power. I could describe some of
8 the forces that affect bargaining power. You
9 know, there's whole courses on this particular
10 topic. And I'd like to think that people
11 retain some of the sophisticated modeling we
12 provide, but at a minimum I would expect them
13 to understand the essence that you want to
14 operate profitable businesses and capture as
15 much as you can from those businesses.

16 CHIEF JUDGE SLEDGE: Mr.
17 Steinthal, is this a logical breaking point?

18 MR. STEINTHAL: Your Honor, if I
19 could five minutes, I'll finish this line if
20 that's okay.

21 CHIEF JUDGE SLEDGE: Yes, sir.

22 BY MR. STEINTHAL:

1 Q Isn't it true, sir, that the major
2 record labels in voluntary transactions charge
3 whatever the market will bear irrespective of
4 issues associated with surplus?

5 A This is what the market will bear.
6 This is an estimate of what the market will
7 bear. That's a good way of summarizing it.

8 Q Well, let me go back to my
9 hypothetical. I'm an online music company. I
10 can't even get into the business of
11 distributing online music without a sound
12 recording license, right?

13 A That's correct. It would be
14 illegal, I think.

15 Q So I created my new online, on
16 demand music streaming service. You with me
17 so far?

18 A Yes, I am.

19 Q I commit copyright infringement if
20 I don't get my licenses first, right?

21 A That's correct.

22 Q So I go to the labels and I

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1 present them with my business plan which has
2 got a lot of zeros for a couple of years in
3 revenue.

4 A Zeros in the sense of no revenue
5 or like big digits?

6 Q Zeros in terms of no revenue.

7 A Okay.

8 Q Because it takes a while to get up
9 and running with the technology costs, with
10 the getting the licenses in place. So I've
11 got some zeros meaning no revenue is coming in
12 and I got a lot of costs coming in. You with
13 me so far?

14 A I am.

15 Q So in the immediate short term I
16 don't have any surplus to share, right?

17 A That's correct.

18 Q You would expect a label not to
19 encourage me to get in the business by
20 charging me nothing. Instead, you would expect
21 based on your knowledge of the industry that
22 in fact the Universal Music Group or the Sony

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1 Music Group will say I want an advance of X
2 and I want at least 50 percent of your
3 revenues coming in the future, right?

4 A Well, it depends on what they
5 could sell the music to to other people. I
6 mean, if everybody in the industry was making
7 zero profits, then I don't think they would be
8 in a position to demand a lot. But if they had
9 other places they could sell it, then they'd
10 be in a good position to say we're not going
11 to sell to you unless you give us a lot of
12 money.

13 Q The bottom line is they don't
14 necessarily price based on the nonexistent or
15 small surplus that may exist at the beginning.
16 They have a number they want, they're a
17 voluntary licensor and they're going to get
18 whatever the market will bear in terms of an
19 advance and a royalty structure, isn't that
20 right?

21 A I don't think you've understood
22 the model. What they will do is capture the

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1 economic surplus. If there's economic surplus
2 to be captured, then they will get a share of
3 that proportioned to their bargaining power.
4 If there's no economic surplus, they won't
5 capture -- there'll be nothing to capture. So
6 that's what they'll do.

7 So let me just leave it there.

8 Q Fair enough.

9 MR. STEINTHAL: I'm done with that
10 subject, Your Honor.

11 CHIEF JUDGE SLEDGE: Mr. Smith,
12 what is the report of your conversations with
13 all of the parties on the progress of Dr.
14 Brynjolfsson continuing his testimony?

15 MR. SMITH: Well, what the parties
16 on the other side of the aisle have told me is
17 that Mr. Joseph has about two hours and Mr.
18 Steintal has no idea how far he has to go.

19 MR. STEINTHAL: Well, that was
20 true a while ago. I have a pretty good idea
21 now.

22 MR. SMITH: Well, that would be

1 good to know, Your Honor. The others, I
2 believe, have perhaps an hour in total
3 together.

4 So if we could find out how much
5 Mr. Steinthal has, it is possible for Dr.
6 Brynjolfsson to move heaven and earth,
7 inconvenience a lot of people, cancel a class
8 and come back tomorrow and not have to leave
9 within an hour. But I hesitate to ask him to
10 do that if we're going to go for another full
11 day and be facing the same conversation at
12 5:00 tomorrow, frankly. We have witnesses
13 backed up already. It's been a day and a
14 half. We have still have one person who at
15 least as of an hour ago couldn't tell me how
16 much more cross we had since we turned this
17 witness over.

18 CHIEF JUDGE SLEDGE: Are you
19 suggesting that a recess of five minutes so
20 that we can get a report from you as to who
21 will be the first witness in the morning?

22 MR. SMITH: If you would like for

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1 us to handle it that way, I'd be happy to do
2 that, Your Honor.

3 CHIEF JUDGE SLEDGE: Okay. We'll
4 recess five minutes.

5 (Whereupon, at 5:12 p.m. a recess
6 until 5:18 p.m.)

7 MR. HANDZO: I believe where we
8 are, Your Honor, is that we will finish up
9 with Dr. Brynjolfsson tomorrow. He will
10 cancel his class. The best estimate, you know,
11 nobody's giving any guarantees but we think
12 we've 4/4½ hours of cross left. And we would
13 then have Harold Bradley as our next witness.
14 I think he was scheduled to be the next. But
15 what this change in schedule probably do is
16 cause us to then go with Mr. Eisenberg on
17 Thursday. I believe he was originally
18 scheduled for Thursday, it's just that we
19 thought we would get Mr. Brian in before that.
20 So it looks like we just move Mr. Brian back
21 to a different spot because of this.

22 CHIEF JUDGE SLEDGE: So Bradley

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1 second and Eisenberg third?

2 MR. HANDZO: Correct.

3 JUDGE WISNIEWSKI: A question. I
4 didn't hear you factor in anything for
5 redirect? Was that intentional?

6 MR. HANDZO: Well, I think there
7 will be some redirect. I don't expect it will
8 be very long. And we don't expect Mr. Bradley
9 to be a very long witness.

10 JUDGE WISNIEWSKI: Okay.

11 THE WITNESS: Just to clarify,
12 that means we'll be done tomorrow?

13 MR. HANDZO: Yes.

14 THE WITNESS: Okay.

15 MR. HANDZO: That is our goal.

16 CHIEF JUDGE SLEDGE: All right.

17 Thank you.

18 MR. HANDZO: Thank you.

19 CHIEF JUDGE SLEDGE: We will
20 recess until 9:30 in the morning.

21 (Whereupon, at 5:19 p.m. the hearing was
22 in recess until 9:30 on May 10, 2006.)

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The Digital Performance Right in
Sound Recordings and Ephemeral
Recordings
Webcasting Rate Adjustment Proceeding

Before:

Copyright Royalty Board
Library of Congress

Date: May 9, 2006

Place: Washington, D.C.

represents the full and complete proceedings of
the aforementioned matter, as reported and
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John Mongoven